

PROPOSED PRETRIAL ORDER

EXHIBIT 18.2

FERRING/REBIOTIX'S MOTION *IN LIMINE* TO EXCLUDE
INFORMATION RELATED TO THE COMPENSATION OF
LEE JONES AND MICHAEL BERMAN

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

FERRING PHARMACEUTICALS INC.,
REBIOTIX INC.

Plaintiffs,

V.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., and FINCH
THERAPEUTICS HOLDINGS, LLC.

C.A. No. 21-1694-JLH

Defendants.

FINCH THERAPEUTICS GROUP, INC..
FINCH THERAPEUTICS, INC., FINCH
THERAPEUTICS HOLDINGS, LLC, and
REGENTS OF THE UNIVERSITY OF
MINNESOTA

Counterclaim-Plaintiffs/Reply Defendants,

V.

FERRING PHARMACEUTICALS INC., and
REBIOTIX, INC.

Counterclaim-Defendants/Reply Plaintiffs.

**FERRING/REBIOTIX'S MOTION IN LIMINE
TO EXCLUDE INFORMATION RELATED TO THE
COMPENSATION OF LEE JONES AND MICHAEL BERMAN**

I. INTRODUCTION

Ferring Pharmaceuticals Inc. and Rebiotix Inc. (collectively “Ferring”) move to preclude Finch Therapeutics Group, Inc., Finch Therapeutics, Inc, Finch Therapeutics Holdings, LLC, and Regents of the University of Minnesota (collectively “Finch”) from introducing evidence or argument regarding the personal wealth of Lee Jones and/or Michael Berman, including, but not limited to, any executive compensation Ms. Jones or Mr. Berman received as a result of the merger between Ferring Pharmaceuticals Inc. and Rebiotix Inc.

Evidence of Ms. Jones and Mr. Berman’s financial positions is wholly irrelevant to the pending patent dispute between Ferring and Finch. Allowing Finch to introduce evidence of their compensation and personal wealth will confuse the issues at trial, mislead the jury, and generate undue prejudice against Ms. Jones, Mr. Berman, and Ferring.

II. ARGUMENT

A. Evidence Regarding Ms. Jones and Mr. Berman’s Compensation Should Be Excluded Because They Are Irrelevant to Finch/Ferring’s Claims.

The personal finances of Ms. Jones and Mr. Berman, including executive compensation they received related to the Ferring-Rebiotix merger, are not relevant to this action, and should be excluded under Federal Rule of Evidence 402. Courts have consistently held that evidence of wealth or financial condition, “is usually irrelevant under rule 401 and unfairly prejudicial under rule 403.” *Sec. & Exch. Comm’n v. Goldstone*, No. CIV 12-0257 JB/GBW, 2016 WL 3654273, at *12 (D.N.M. June 13, 2016); *Liqwd, Inc. v. L’Oréal USA, Inc.*, No. 17-14-JFB-SRF, 2019 WL 2775515, at *1 (D. Del. July 2, 2019) (holding that “that any evidence as to defendants’ overall financial status [was] irrelevant and [was] potentially prejudicial”).

Here, there is no compelling reason to depart from the default rule. Ferring anticipates that Finch will attempt to offer evidence as to the personal finances of Ms. Jones and Mr.

Berman, particularly with respect to their compensation related to the Ferring-Rebiotix merger. Ms. Jones was the CEO of Rebiotix at the time of the merger and Mr. Berman is one of the company's founders. Evidence related to their executive compensation has no bearing on the issues of patent infringement and invalidity. Such evidence is irrelevant and should be excluded under Federal Rules of Evidence 401 and 402.

Finch may take the position that such information is relevant insofar as it bears on Ms. Jones's or Mr. Berman's motivations or biases. The financial gain of these individuals bears no relationship to the ultimate questions of patent validity/infringement presented in the case. *See U.S. v. Mitchell*, 172 F.3d 1104, 1109 (9th Cir. 1999) (evidence of financial motivation "does not prove much, because almost everyone ... has a motive to get more money"). Furthermore, to the extent that Finch wishes to argue that Ms. Jones or Mr. Berman were biased in favor of Rebiotix, they can make that argument based on their respective positions within the company without discussion of the financial compensation they received.

B. In the Alternative, Evidence Regarding Ms. Jones's and Mr. Berman's Compensation Should Be Excluded Because It Will Confuse the Issues, Mislead the Jury, and Create Undue Prejudice.

Even if evidence concerning Ms. Jones's and Mr. Berman's finances was somehow minimally relevant, it should still be excluded under Rule 403 as unduly prejudicial and likely to confuse and mislead the jury.

Courts have repeatedly recognized reference to a parties' wealth and/or compensation to be improper and prejudicial. *See U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) (finding that appeals to class prejudice were improper); *see also Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978) (holding that juries "should not be urged to predicate its verdict on a prejudice against ... wealth"); *Finjan, Inc. v. Sophos, Inc.*, No. 14-CV-01197-WHO, 2016 WL 4560071, at *15 (N.D. Cal. Aug. 22, 2016) ("[E]vidence regarding [Sophos's founders' or

employees'] wealth and compensation is far more likely to be prejudicial than to be probative," and their bias was already clear from their positions within the company).

III. CONCLUSION

For the foregoing reasons, Ferring respectfully requests that the Court preclude Finch from presenting evidence or argument regarding wealth or financial compensation of Ms. Jones or Mr. Berman.

Dated: June 27, 2024

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and Rebiotix Inc.*

PROPOSED PRETRIAL ORDER

EXHIBIT 18.2

**UMN/FINCH'S OPPOSITION TO FERRING/REBIOTIX'S
MOTION *IN LIMINE* NO. 2 TO EXCLUDE INFORMATION
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**IN THE UNITED STATES DISTRICT COURT
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FERRING PHARMACEUTICALS INC.,
REBIOTIX INC.

Plaintiffs,

V.

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FINCH THERAPEUTICS, INC., and FINCH
THERAPEUTICS HOLDINGS, LLC.

Defendants.

C.A. No. 21-1694-JLH

FILED UNDER SEAL

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., FINCH
THERAPEUTICS HOLDINGS, LLC, and
REGENTS OF THE UNIVERSITY OF
MINNESOTA

Counterclaim-Plaintiffs/Reply Defendants,

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**UMN/FINCH'S OPPOSITION TO FERRING/REBIOTIX'S MOTION *IN LIMINE* NO. 2
TO EXCLUDE INFORMATION RELATED TO THE COMPENSATION OF
LEE JONES AND MICHAEL BERMAN**

Ferring sets forth no reason to preclude UMN/Finch from introducing evidence related to the amount of compensation received by key Ferring witnesses and former Rebiotix founders and executives, Lee Jones and Michael Berman. Such evidence is directly relevant to establish bias of both Ms. Jones and Mr. Berman. There is nothing unfairly prejudicial about this factual information that is critical to the jury's ability to weigh witness credibility. Moreover, UMN/Finch will not present general evidence as to Ms. Jones' and Mr. Berman's "personal wealth" or "overall" financial status. Ferring's MIL #2 should be denied.

There is not, as Ferring claims, a "default rule" to exclude evidence of bias. Ex. 18-2 at 1. To the contrary, "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52 (1984); *see also Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 1991 WL 212087, at *3 (E.D. Pa. Oct. 15, 1991) ("Evidence of witness bias is always admissible at trial, and is thus relevant."). That applies with particular force here, as third parties Lee Jones and Michael Berman are two of only **three** fact witnesses Ferring represented it "[w]ill call" at trial, Ex. A (Jun. 3, 2024 Ferring Witness List), and both received substantial payouts from Ferring's merger with Rebiotix, PTX-204.0019; Ex. B (L. Jones Dep. Tr.) at 368:8–369:11; Ex. C (M. Berman Dep. Tr.) at 145:24–146:19. Although Ferring may seek to present Ms. Jones and Mr. Berman as objective third parties, Ms. Jones and Mr. Berman received [REDACTED] in connection with Ferring's acquisition of Rebiotix, and renegotiated additional payments by Ferring, **during this litigation**, which ensured [REDACTED] [REDACTED]. PTX-57.0002–3; Ex. B (L. Jones Dep.) at 377:16–382:21; Ex. C (M. Berman Dep.) at 301:6–318:2. The jury should be permitted to consider the credibility of their testimony on Ferring's behalf in view of the substantial compensation that Ferring provided them.

In re 3M Combat Arms Earplug Prods. Liab. Litig., 2021 WL 1088433, at *3 (N.D. Fla. Mar. 22, 2021) (“employee compensation packages . . . is admissible for purposes of establishing witness bias.”); *Hayes v. Compass Grp. USA, Inc.*, 202 F.R.D. 363, 365 (D. Conn. 2001) (similar). Additionally, Ferring’s payments to Ms. Jones and Mr. Berman “may be relevant to their motivation for making certain decisions on behalf of the defendant corporations,” such as decisions to copy UMN/Finch inventions and willfully infringe. *In re Tylenol (Acetaminophen) Mktg., Sales Pracs. & Prod Liab. Litig.*, 181 F. Supp. 3d 278, 294 (E.D. Pa. 2016); *In re Lidoderm Antitrust Litig.*, 2018 WL 7814761, at *5 (N.D. Cal. Feb. 7, 2018) (“Compensation of Former Employees of Defendants” is relevant to those witnesses’ “alleged bias (*e.g.*, the employee’s compensation arrangement allegedly incentivized them to support the Settlement in the first instance or defend the Settlement now)”). There is nothing unfairly prejudicial about such evidence. *See Tylenol*, 181 F. Supp. 3d at 294 (“no reason why all employee compensation evidence should be precluded based on ‘unfair prejudice’ under Rule 403”).

To argue against the clear admissibility of this bias evidence, Ferring cites cases excluding general evidence of a witness’s “wealth or financial condition.” Ex. 18-2 at 1. UMN/Finch have no intention of introducing such general evidence. Rather, the only evidence relating to Ms. Jones’ and Mr. Berman’s finances that UMN/Finch intend to introduce relates to the compensation those two key Ferring witnesses received from the Ferring/Rebiotix merger, and none of Ferring’s cited cases exclude such evidence. *SEC v. Goldstone*, 2016 WL 3654273, at *12 (D.N.M. June 13, 2016) (“evidence of wealth is irrelevant”); *Liqwd, Inc. v. L’Oreal USA, Inc.*, 2019 WL 2775515, at *1 (D. Del. July 2, 2019) (“evidence as to defendants’ overall financial status is irrelevant,” but “evidence as to profits relating to the allegations in this case are admissible and relevant”).

Ferring also claims this bias evidence should be excluded because it is not relevant to

infringement and invalidity. Ex. 18-2 at 2. Not so. Both Ms. Jones and Mr. Berman will be asked questions that bear on infringement and validity. The credibility of their testimony is critical to both issues. *Abel*, 469 U.S. at 52. Ferring tacitly acknowledges that bias evidence is relevant, but claims that UMN/Finch “can make that [bias] argument based on their respective positions in the company.” Ex. 18-2 at 2. But Ms. Jones and Mr. Berman are no longer employed by Ferring or Rebiotix so they no longer have “positions” at Ferring, and regardless, there is a significant difference between *past* titles that do not provide the opportunity to test those witnesses’ bias as *current* Ferring employees.¹ How to interpret this evidence is “best left for the jury to determine.” *Food Lion, LLC v. Dean Foods Co.*, 2017 WL 11681188, at *4 (E.D. Tenn. Mar. 20, 2017).

Finally, Ferring suggests that bias evidence is unfairly prejudicial, but none of its cases support its position. Rather, they each concern arguments related to “class prejudice” or “bias” against the wealthy or poor. *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238 (1940) (no error despite closing argument asking jury “which shall rule, wealth or man? Which shall lead, money or intellect?”); *Draper v. Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978) (improper to ask the jury “to tumble the magnificent big companies here with all their engineers”); *U.S. v. Mitchell*, 172 F.3d 1104, 1110 (9th Cir. 1999) (improper to portray defendant as “feckless man who did not support his wife and children”). These are arguments UMN/Finch will not make. But Finch/UMN must be permitted to inquire into Ms. Jones’ and Mr. Berman’s bias and excluding the significant compensation Ferring paid them in connection with the Ferring/Rebiotix merger would impede the jury’s ability to assess their credibility. The law is clear that such evidence is relevant and not unfairly prejudicial. *In re Tylenol*, 181 F. Supp. 3d at 294. Ferring’s motion should be denied.

¹ *Finjan, Inc. v. Sophos, Inc.*, 2016 WL 4560071, at *15 (N.D. Cal. Aug. 22, 2016), is therefore inapposite because the witnesses still had a relationship with the defendant.

EXHIBIT A

PROPOSED PRETRIAL ORDER

EXHIBIT 10

FERRING/REBIOTIX'S WITNESS LIST

CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER

As required by District of Delaware Local Rule 16.3(c)(7), Ferring/Rebiotix disclose the following list of witnesses they will or may call at trial to testify in person or by deposition. Ferring/Rebiotix reserve the right to revise or supplement this list consistent with the Pretrial Order or as otherwise permitted by the Court. For all expert witnesses listed by Finch/UMN, Ferring/Rebiotix reserve the right to introduce deposition testimony in the event that any such witness does not testify in person at trial. Ferring/Rebiotix further reserve the right to call any witness listed by Finch/UMN in Exhibit 9.

1. The following fact witnesses will or may be called by Ferring/Rebiotix, in person or by deposition:

Witness	Will or may call? In person or by deposition?
Mary Ellen Anderson	May call (by deposition)
Lindy Bancke	May call (in person)
David Bell	May call (in person)
Michael Berman	Will call (in person)
Greg Fluet	May call (in person)
Matthew Green	May call (in person)
Ed Hlavka	May call (in person or by deposition)
Courtney Jones	Will call (in person)
Lee Jones	Will call (in person)
Ben Merrifield	May call (by deposition)
Kristin Wannerberger	May call (in person or by deposition)
Ashley Ross	May call (in person)

Witness	Will or may call? In person or by deposition?
Kevin Anderson	May call (by deposition)
Matthew Blischak	May call (in person)
James Burgess	May call (by deposition)
Matthew Hamilton	May call (by deposition)
Alexander Khoruts	May call (by deposition)
William Kieper	May call (by deposition)
Michael Sadowsky	May call (by deposition)
Mark Smith	May call (by deposition)
Russ Straate	May call (by deposition)
Alexa Weingarden	May call (by deposition)
Thomas Borody	May call (in person)

2. The following expert witnesses will or may be called by Ferring/Rebiotix, in person or by deposition:

Witness	Will or may call? In person or by deposition?
Robert Britton	Will call (in person)
Richard Johnson	Will call (in person)
Kurt Karst	May call (in person)
Colleen Kraft	May call (in person)
Thomas Louie	May call (in person)
Christopher Polage	May call (in person)
Jonathan Putnam	Will call (in person)
Tor Savidge	May call (in person)
Todd Treangen	May call (in person)

EXHIBIT B

HIGHLY CONFIDENTIAL

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

- - - - -x

FERRING PHARMACEUTICALS INC.
and REBIOTIX INC.,

Plaintiffs,

vs.

Civil Action No.
21-1694-RGA

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., and
FINCH THERAPEUTICS HOLDINGS, LLC,

Defendants.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., and
FINCH THERAPEUTICS HOLDINGS, LLC,
and THE REGENTS OF THE UNIVERSITY
OF MINNESOTA,

Counterclaim Plaintiffs/Reply
Defendants,

vs.

FERRING PHARMACEUTICALS INC.
and REBIOTIX INC.,

Counterclaim Defendants/Reply
Plaintiffs.

- - - - -x

HIGHLY CONFIDENTIAL
VIDEOTAPED DEPOSITION OF LEE JONES
Wilmington, Delaware
Friday, April 21, 2023

- - -

REPORTED BY:

LORRAINE B. MARINO, RDR, CRR, CLR

Job no: 6863

EXHIBIT 18-2 - OPPOSITION
HIGHLY CONFIDENTIAL

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1 [REDACTED]

10 Q So I would like to finally ask you
11 about the merger between Ferring and Rebiotix.
12 Is it correct that Ferring acquired Rebiotix
13 through a merger in 2018?

14 A Yes.

15 MS. DeVRIES: And could we please
16 mark Document 46 as Exhibit 48.

17 (L. Jones Deposition Exhibit No. 48
18 was marked for identification.)

19 THE VIDEOGRAPHER: Ending in 4739?

20 MS. DeVRIES: Yes.

21 MS. SEVERANCE: Real quick, for
22 the videographer, can I have a time
23 check?

24 THE VIDEOGRAPHER: This session,
25 we are on the record 17 minutes, 59

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1 seconds; 18 minutes.

2 MS. SEVERANCE: Remaining.

3 THE VIDEOGRAPHER: From 42. No,
4 no. 18 used of the 42.

5 MS. DeVRIES: Do you have the
6 information that you needed,
7 Ms. Severance?

8 MS. SEVERANCE: Thank you, yes.

9 MS. DeVRIES: Am I right that that
10 means that I should finish by 6:20?

11 MS. SEVERANCE: That's my
12 calculation.

13 MS. DeVRIES: Okay. I don't want
14 to -- hopefully, that will be helpful.

15 BY MS. DeVRIES:
16 [REDACTED]

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HIGHLY CONFIDENTIAL

<div>1</div> <div>Page 370</div> <div>[REDACTED]</div>	<div>1</div> <div>Page 372</div> <div>[REDACTED]</div>
<div>1</div> <div>Page 371</div> <div>[REDACTED]</div>	<div>1</div> <div>Page 373</div> <div>[REDACTED]</div>

94 (Pages 370 to 373)

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<p>Page 374</p> <p>1 [REDACTED]</p>	<p>Page 376</p> <p>1 [REDACTED]</p>
<p>Page 375</p> <p>1 [REDACTED]</p>	<p>Page 377</p> <p>1 [REDACTED]</p>

95 (Pages 374 to 377)

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<p>Page 378</p> <p>1 [REDACTED]</p>	<p>Page 380</p> <p>1 [REDACTED]</p>
<p>Page 379</p> <p>1 [REDACTED]</p>	<p>Page 381</p> <p>1 [REDACTED]</p>

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Page 382	Page 384
<p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>	<p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 MS. DeVRIES: I don't have any</p> <p>8 other questions.</p> <p>9 MS. SEVERANCE: Okay. Can we go</p> <p>10 ahead and take a break?</p> <p>11 MS. DeVRIES: Sure.</p> <p>12 THE VIDEOGRAPHER: We are now off</p> <p>13 the record, and the time is 6:18 p.m.</p> <p>14 (Recess taken.)</p> <p>15 THE VIDEOGRAPHER: We are now on</p> <p>16 the record. The time is 6:24 p.m. And</p> <p>17 for the record, as of this point in the</p> <p>18 deposition we are on the record for six</p> <p>19 hours, 56 minutes and 54 seconds.</p> <p>20 MS. SEVERANCE: Thank you. I am</p> <p>21 going to go ahead and mark the</p> <p>22 transcript highly confidential under the</p> <p>23 protective order.</p> <p>24 I have no questions, Ms. Jones.</p> <p>25 Thank you for your attendance today.</p>
Page 383	Page 385
<p>1 [REDACTED]</p> <p>2 [REDACTED]</p> <p>3 [REDACTED]</p> <p>4 [REDACTED]</p> <p>5 [REDACTED]</p> <p>6 [REDACTED]</p> <p>7 [REDACTED]</p> <p>8 [REDACTED]</p> <p>9 [REDACTED]</p> <p>10 [REDACTED]</p> <p>11 [REDACTED]</p> <p>12 [REDACTED]</p> <p>13 [REDACTED]</p> <p>14 [REDACTED]</p> <p>15 [REDACTED]</p> <p>16 [REDACTED]</p> <p>17 [REDACTED]</p> <p>18 [REDACTED]</p> <p>19 [REDACTED]</p> <p>20 [REDACTED]</p> <p>21 [REDACTED]</p> <p>22 [REDACTED]</p> <p>23 [REDACTED]</p> <p>24 [REDACTED]</p> <p>25 [REDACTED]</p>	<p>1 MS. DeVRIES: And thank you,</p> <p>2 Ms. Jones. I appreciate your time.</p> <p>3 MS. SEVERANCE: Reserve reading</p> <p>4 and signing.</p> <p>5 THE VIDEOGRAPHER: We are now</p> <p>6 concluding today's deposition and off</p> <p>7 the record at 6:25 p.m.</p> <p>8 ---</p> <p>9 (Deposition concluded at 6:25 p.m.)</p> <p>10 ---</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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HIGHLY CONFIDENTIAL

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<p>1 ACKNOWLEDGMENT</p> <p>2 I, LEE JONES, hereby certify that</p> <p>3 I have read the transcript of my</p> <p>4 testimony taken under oath in my</p> <p>5 deposition on April 21, 2023; that the</p> <p>6 transcript is a true, complete and</p> <p>7 correct record of my testimony, and that</p> <p>8 the answers on the record as given by me</p> <p>9 are true and correct.</p> <p>10</p> <p>11</p> <p>12 _____</p> <p>13 LEE JONES</p> <p>14</p> <p>15</p> <p>16 Signed and subscribed to before me this _____</p> <p>17 day of _____, 2023.</p> <p>18</p> <p>19 _____</p> <p>20 Notary Public</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 CERTIFICATE OF REPORTER</p> <p>2</p> <p>3 I, Lorraine B. Marino, Registered Diplomate</p> <p>4 Reporter, Certified Realtime Reporter and Notary</p> <p>5 Public, do hereby certify that there came before</p> <p>6 me on APRIL 21, 2023, the deponent herein, LEE</p> <p>7 JONES, who was duly sworn by me and thereafter</p> <p>8 examined by counsel for the respective parties;</p> <p>9 that the questions asked of said deponent and the</p> <p>10 answers given were taken down by me in Stenotype</p> <p>11 notes and thereafter transcribed by use of</p> <p>12 computer-aided transcription and computer printer</p> <p>13 under my direction.</p> <p>14 I further certify that the foregoing is a</p> <p>15 true and correct transcript of the testimony</p> <p>16 given at said examination of said witness.</p> <p>17 I further certify that the deposition was</p> <p>18 made available to the witness for reading and</p> <p>19 signing.</p> <p>20 I further certify that I am not counsel</p> <p>21 attorney, or relative of either party, or</p> <p>22 otherwise interested in the event of this suit.</p> <p>23</p> <p>24 _____</p> <p>25 Lorraine B. Marino, RDR, CRR</p> <p>Date: 4/23/23</p>
<p>Page 387</p> <p>1 TRANSPERFECT LEGAL SOLUTIONS</p> <p>2 216 E. 45th Street, Tenth Floor</p> <p>3 NEW YORK, NEW YORK 10017</p> <p>4 (212) 867-6600</p> <p>5 DEPONENT: LEE JONES</p> <p>6 DATE: April 21, 2023</p> <p>7 CASE: Ferring, et al. v. Finch, et al.;</p> <p>8 USDC DE No. 21-1694-RGA</p> <p>9 ERRATA SHEET</p> <p>10 PAGE/LINE/ CHANGE OR CORRECTION AND REASON</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22 I have read the foregoing transcript of my</p> <p>23 deposition and, except for any corrections or</p> <p>24 changes noted above, I hereby subscribe to the</p> <p>25 transcript as an accurate record of the</p> <p>statements made by me.</p> <p>Date: _____</p> <p>Signature of Deponent</p>	

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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FERRING PHARMACEUTICALS, INC.
and REBIOTIX INC.,

v.

Plaintiffs,

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., and
FINCH THERAPEUTICS HOLDINGS,
LLC,

Defendants.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS INC.,
FINCH THERAPEUTICS HOLDINGS,
LLC, and THE REGENTS OF THE
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Counterclaim Plaintiffs/Reply
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FERRING PHARMACEUTICALS, INC.,
and REBIOTIX, INC.,

Counterclaim Defendants/Reply
Plaintiffs.

** HIGHLY CONFIDENTIAL UNDER THE PROTECTIVE ORDER **

DEPOSITION OF MICHAEL BERMAN

TUESDAY, MAY 9, 2023

(Caption continued on next page)

HIGHLY CONFIDENTIAL UNDER THE PROTECTIVE ORDER

<p>1 University of Minnesota has -- withdrawn. 2 Are you aware that the 3 University of Minnesota has patents covering 4 FMT technologies created by Dr. Sadowsky and 5 Dr. Khoruts? 6 A. I am. 7 Q. When did you first find out 8 that the University of -- withdrawn. 9 How did you become aware of 10 those patents? 11 MS. SEVERANCE: I'm going to 12 caution the witness not to reveal the 13 substance of any attorney-client 14 communications. If you can answer without 15 doing so, you may. 16 THE WITNESS: I don't recall. 17 BY MR. ALPER: 18 Q. When did you first find out 19 that the University of Minnesota -- 20 withdrawn. Sorry. 21 When did you first find out 22 that Rebiotix was, you know, accused of 23 infringing the University of Minnesota 24 patents?</p> <p style="text-align: right;">Page 142</p>	<p>1 correctly. 2 MR. ALPER: Sure. 3 BY MR. ALPER: 4 Q. What's your understanding of 5 the role of -- if any, of the University of 6 Minnesota's patents covering Dr. Sadowsky and 7 Dr. Khoruts' FMT inventions in this case, 8 this litigation? 9 MS. SEVERANCE: And I'm going 10 to caution and instruct the witness not to 11 reveal the substance of any attorney-client 12 communications. If you can answer without 13 doing so, you may. 14 THE WITNESS: I can't answer 15 that question without revealing 16 attorney-client communication. 17 BY MR. ALPER: 18 Q. If we look at Exhibit 8 that is 19 the document that was tab 24, is it fair to 20 say that one takeaway from Dr. Sadowsky's 21 e-mail to you and Mr. Hlavka is that 22 Dr. Sadowsky and Dr. Khoruts are seeking 23 patent protection on their FMT technologies? 24 MS. SEVERANCE: Objection.</p> <p style="text-align: right;">Page 144</p>
<p>1 MS. SEVERANCE: Same cautionary 2 instruction. The question is when. 3 THE WITNESS: I'm not aware of 4 that. 5 BY MR. ALPER: 6 Q. Okay. Do you have an 7 understanding that the -- withdrawn. 8 Do you have an understanding 9 that in this case Rebiotix is accused of 10 infringing University of Minnesota patents 11 covering Dr. Sadowsky and Dr. Khoruts' FMT 12 inventions? 13 A. I'm not aware of that. This 14 is -- I'm not aware of that until this 15 moment. 16 Q. Okay. Do you have an 17 understanding that the University of 18 Minnesota patents covering Dr. Sadowsky and 19 Dr. Khoruts' FMT inventions are at issue in 20 this lawsuit? 21 MS. SEVERANCE: Same cautionary 22 instruction. 23 THE WITNESS: Repeat the 24 question? I want to make sure I understand</p> <p style="text-align: right;">Page 143</p>	<p>1 Form. 2 THE WITNESS: I don't know. 3 BY MR. ALPER: 4 Q. Okay. Is it important to you 5 to know what patents are being asserted 6 against Rebiotix? 7 MS. SEVERANCE: Objection. 8 Form. 9 THE WITNESS: Today? 10 BY MR. ALPER: 11 Q. Yes. 12 A. I'm just a witness in this 13 lawsuit. 14 Q. Right. I mean, you were a very 15 important person at Rebiotix prior to the 16 sale to Ferring, correct? 17 MS. SEVERANCE: Objection. 18 Form. 19 THE WITNESS: I was -- I was a 20 founder or a co-founder of Rebiotix. I was 21 chairman of the board. So I was very 22 involved, yes. 23 BY MR. ALPER: 24 [REDACTED]</p> <p style="text-align: right;">Page 145</p>

[illegible]

1 A. Inlet Medical. Somebody
2 introduced us and I don't recall who that
3 was.
4 Q. When was that?
5 A. That was a long time ago. I
6 don't remember.
7 Q. Between the time that you first
8 met Lee Jones and when you started working
9 with Lee Jones in connection with the FMT
10 project, did you have other touchpoints with
11 her?
12 A. No.
13 Q. How did you connect with
14 Ms. Jones in connection with the FMT project?
15 A. My recollection is that I saw a
16 mutual friend of ours, a fellow named Warren
17 Watson, at a party. And we were discussing
18 various goings-on in the medical world of
19 Minneapolis. And I mentioned to him that I
20 was working on a microbiome project. And he
21 shared with me that Lee Jones was also
22 working on something similar and that it made
23 sense for us to connect. And that was how we
24 got connected on the microbiome project, what

1 [REDACTED] [REDACTED]
2 Q. At the time that you were
3 chairman of the board of Rebiotix, was it
4 important to you to know about what patents
5 that Rebiotix might be infringing?
6 MS. SEVERANCE: Objection.
7 Form.
8 THE WITNESS: It was -- the
9 premise of your question is wrong. As the
10 chairman of Rebiotix, it was important for me
11 to understand the patent landscape and make
12 sure that we were pursuing patents that were
13 free for us to operate.
14 BY MR. ALPER:
15 Q. Okay. Let's shift gears a
16 little bit.
17 How did you meet Lee Jones?
18 A. I met Lee Jones initially when
19 she was CEO of Inlet Medical, and I don't
20 recall who introduced us.
21 Q. Okay. And how did you meet her
22 in that context? Why did you become
23 connected with Lee Jones when she was CEO of,
24 what was it, Intelet Medical?

1 turned into Rebiotix.
2 Q. And when was that?
3 A. That was late 2010 when I met
4 Warren Watson and early 2011 when Lee Jones
5 and I connected.
6 Q. And it was in early 2011 that
7 you first discussed FMT with Ms. Jones?
8 A. Yes, that's my recollection.
9 Q. Okay. And what did you talk
10 about with her?
11 A. I don't recall the specifics.
12 Q. Describe the process from
13 meeting Ms. Jones in early 2011 to forming an
14 FMT company. How did it progress?
15 MS. SEVERANCE: Objection.
16 Form.
17 THE WITNESS: Well, we met a
18 number of times in 2011. My recollection is
19 that we shared what we had done and what our
20 knowledge and experience and aspirations were
21 in this field, and that it culminated in us,
22 along with bringing in Erwin Kelen as a
23 co-founder, in creating initially what we
24 called MikrobEX and later changed the name to

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<p>1 At the bottom it has a -- it 2 lists the file custodian as you, Mike Berman, 3 right? 4 A. Right. 5 Q. And then it has the file date 6 of December 16, 2009. 7 Do you see that? 8 A. Yes. 9 Q. Okay. And so my question for 10 you is, so -- withdrawn. 11 When did you come into 12 possession of this FMT article authored by 13 Drs. Khoruts and Sadowsky? 14 A. I don't recall. 15 Q. Okay. Let me direct you to one 16 other thing. If you look at the first page 17 of the article, and you go down to the lower 18 left-hand column, below that column it says, 19 Journal of Clinical Gastroenterology, 20 Volume 0, Number 0, and then it says 2009. 21 Do you see that? 22 A. Right. 23 Q. In 2009 was the Journal of 24 Clinical Gastroenterology at Volume 0,</p> <p style="text-align: right;">Page 298</p>	<p>1 let me ask this one other questions -- 2 question. Here's my question. 3 How did you obtain the FMT 4 article written by Dr. Khoruts and 5 Dr. Sadowsky that's Exhibit 20? 6 A. I don't recall. 7 Q. Okay. Is it possible that you 8 obtained a prepublication version of the 9 article that had not yet officially been 10 published in the Journal of Clinical 11 Gastroenterology? 12 MS. SEVERANCE: Objection. 13 Form. 14 THE WITNESS: I don't know. 15 BY MR. ALPER: 16 Q. And did you share the article 17 that's at Exhibit 20, the FMT article from 18 Drs. Khoruts and Sadowsky, with anyone? 19 A. I don't recall. 20 Q. Okay. Do you have any idea as 21 to when the FMT article from Drs. Khoruts and 22 Sadowsky that's Exhibit 20 was published? 23 A. No. 24 Q. Okay. All right. Let me ask</p> <p style="text-align: right;">Page 300</p>
<p>1 Number 0? 2 MS. SEVERANCE: Objection. 3 Form. 4 THE WITNESS: I don't know. 5 BY MR. ALPER: 6 Q. I mean, typically journals 7 would start at Volume 1 or, you know, have 8 some -- they wouldn't start at zero. Is that 9 generally your experience? 10 MS. SEVERANCE: Objection. 11 Form. 12 THE WITNESS: Yes. 13 BY MR. ALPER: 14 Q. Is the FMT article that's 15 Exhibit 20 from Dr. Khoruts and Dr. Sadowsky, 16 is this a draft of an article that had not 17 yet been published? 18 MS. SEVERANCE: Objection. 19 Form. 20 THE WITNESS: I don't know. 21 BY MR. ALPER: 22 Q. Okay. And I'm sorry if I 23 already asked this, but once I gave you that 24 context, it's probably worth reasking. So</p> <p style="text-align: right;">Page 299</p>	<p>1 you a few questions about the acquisition by 2 Ferring. So I'll just give you a preview of 3 what I'm going to be asking about. It's 4 going to be a very specific aspect of the 5 acquisition. 6 I'd like to ask you some 7 questions about the original merger agreement 8 and then the settlement agreement that I've 9 seen that came after that. So let me start 10 with the original acquisition agreement. So 11 here's my question. 12 In the original acquisition 13 agreement, is it correct that you were to be 14 compensated in a series of milestones? Is 15 that correct? Or at least that's part of 16 your compensation? 17 A. Milestones and royalties, yes. 18 Q. Yes. Okay. So, sorry. I 19 should have done it that way from the 20 beginning. In the March two thousand -- 21 withdrawn. 22 The agreement for the merger 23 between Rebiotix and Ferring, that was -- 24 that's dated March 2018, correct?</p> <p style="text-align: right;">Page 301</p>

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<p>1 A. Correct.</p> <p>2 Q. And in that March 2018</p> <p>3 agreement, you were to be compensated in two</p> <p>4 forms. One was a series of milestone</p> <p>5 payments, in other words, payments that went</p> <p>6 to you when Rebiotix hit certain milestones,</p> <p>7 and then, secondly, royalties on sales of</p> <p>8 Rebiotix's FMT product, correct?</p> <p>9 A. You're missing the upfront</p> <p>10 payment as well.</p> <p>11 Q. Ah. Okay. So let me do that</p> <p>12 again.</p> <p>13 In the March 2018 merger</p> <p>14 agreement, you were to be compensated in</p> <p>15 three ways. One was an upfront payment;</p> <p>16 second, a series of milestone payments when</p> <p>17 Rebiotix hit certain milestones in product</p> <p>18 development; and then, third, you would get</p> <p>19 royalties from Rebiotix's sales of its</p> <p>20 products, correct?</p> <p>21 A. Correct.</p> <p>22 Q. And in the original merger</p> <p>23 agreement, there was also a provision</p> <p>24 regarding adjustments that could be made to</p> <p style="text-align: right;">Page 302</p>	<p>1 BY MR. ALPER:</p> <p>2 Q. Okay. So would your answer</p> <p>3 have been different without your counsel's</p> <p>4 instruction?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. So there is information</p> <p>7 that you recall that's responsive to my</p> <p>8 question; it's just attorney-client</p> <p>9 communication information. Is that what</p> <p>10 you're saying?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. So but for your</p> <p>13 attorney's instruction, you could answer my</p> <p>14 question with, you know, actual facts other</p> <p>15 than saying you don't recall.</p> <p>16 A. I think I answered your</p> <p>17 question with actual facts.</p> <p>18 Q. Okay. Well, that's what I'm</p> <p>19 trying to get at. I just want to make sure I</p> <p>20 understand. So I think I do. Okay. I think</p> <p>21 we got it.</p> <p>22 And you're not providing</p> <p>23 attorney -- just to -- this is one of those</p> <p>24 things that I've been following up all day,</p> <p style="text-align: right;">Page 304</p>
<p>1 those amounts where the -- those amounts</p> <p>2 would be adjusted down if Rebiotix was</p> <p>3 required to take patent licenses or expend</p> <p>4 money in defending its products against</p> <p>5 licensing demands; is that correct?</p> <p>6 MS. SEVERANCE: Objection.</p> <p>7 Form.</p> <p>8 THE WITNESS: Yes.</p> <p>9 BY MR. ALPER:</p> <p>10 Q. Okay. And when the merger</p> <p>11 agreement was put together, did anyone on</p> <p>12 your side for Rebiotix or anyone on the</p> <p>13 Ferring side have Dr. Borody's patents or the</p> <p>14 University of Minnesota patents in mind when</p> <p>15 putting in that section on the downward</p> <p>16 adjustments that would have to be made to</p> <p>17 your payments in view of patent licensing?</p> <p>18 MS. SEVERANCE: I'm going to</p> <p>19 caution the witness not to reveal the</p> <p>20 substance of any attorney-client</p> <p>21 communications. You can answer that to the</p> <p>22 extent your response would not reveal such</p> <p>23 communications to the extent they exist.</p> <p>24 THE WITNESS: I don't recall.</p> <p style="text-align: right;">Page 303</p>	<p>1 so let me do it here.</p> <p>2 You're not providing</p> <p>3 attorney-client communication information in</p> <p>4 response to my question because you're</p> <p>5 following your attorney's instruction,</p> <p>6 correct?</p> <p>7 A. Correct.</p> <p>8 Q. Okay. When -- withdrawn.</p> <p>9 In August 2022, you and some of</p> <p>10 your other colleagues from Rebiotix entered</p> <p>11 into a settlement agreement with Rebiotix,</p> <p>12 correct? I'm sorry. Sorry. Scratch that.</p> <p>13 In August 2022, you and some of</p> <p>14 your other colleagues from Rebiotix entered</p> <p>15 into a settlement agreement with Ferring,</p> <p>16 correct?</p> <p>17 A. Correct.</p> <p>18 Q. And the settlement agreement</p> <p>19 modified the payment provisions from the</p> <p>20 March 2018 merger agreement; is that correct?</p> <p>21 A. Yes.</p> <p>22 Q. And that was part of a release</p> <p>23 of liability that was being granted in that</p> <p>24 agreement, right?</p> <p style="text-align: right;">Page 305</p>

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<p>1 MS. SEVERANCE: Objection. 2 Form. 3 THE WITNESS: It was part of a 4 large agreement. 5 BY MR. ALPER: 6 Q. Okay. Let me ask you -- come 7 at this much more simply. 8 Why did you enter into the 9 settlement agreement in August 2022? 10 A. Basically, both sides agreed 11 that it made sense to renegotiate the 12 agreement and to substitute a long, expensive 13 stream of potential milestones and royalty 14 payments for a discounted but immediate or 15 close to immediate payment, payout. 16 Q. And in August 2020 -- 17 withdrawn. August 2022 was after -- 18 withdrawn. 19 You executed the settlement 20 agreement after Ferring filed this 21 litigation, in other words, filed the 22 litigation on Finch's patents, correct? 23 MS. SEVERANCE: Objection. 24 Form.</p> <p style="text-align: right;">Page 306</p>	<p>1 through correspondence, conversations, 2 e-mails, a letter, raised a claim to Ferring? 3 A. I don't know. 4 Q. Okay. Had you raised any 5 claims to Ferring? 6 A. No. 7 Q. At the time of the settlement 8 agreement or prior to the time of the 9 settlement agreement, had Ferring raised any 10 claims against you or any of your colleagues? 11 A. I don't know. 12 Q. And had Ferring raised any 13 claims against you specifically? 14 A. Not that I'm aware of. 15 Q. Okay. The agreement from 16 August 2022 itself is referred to as a 17 settlement agreement. 18 Why is it called a settlement 19 agreement? What was it settling? 20 A. Good question. I don't know. 21 MR. ALPER: Okay. So let me -- 22 I'd like to mark a couple of exhibits. Okay. 23 Let's mark tab 65. That's the merger 24 agreement. I think that's going to be</p> <p style="text-align: right;">Page 308</p>
<p>1 THE WITNESS: That's my 2 understanding. 3 BY MR. ALPER: 4 Q. And had -- withdrawn. 5 At the time of the settlement 6 agreement, had either side raised potential 7 claims against each other? 8 MS. SEVERANCE: Objection. 9 Form. 10 MR. ALPER: Withdrawn. Let me 11 say that a better way. 12 BY MR. ALPER: 13 Q. At the time of the settlement 14 agreement, had you or any of your colleagues 15 at Rebiotix raised any claims or claims for 16 liability against Ferring? 17 A. Meaning that we sued Ferring? 18 Is that your question? 19 Q. No. A little more broad than 20 that. 21 At the time of the settlement 22 agreement, had you or any of your colleagues 23 at Rebiotix raised a claim to Ferring, in 24 other words, said, hey, you know, informally,</p> <p style="text-align: right;">Page 307</p>	<p>1 Exhibit 21. 2 (Exhibit 21 marked for 3 identification.) 4 THE WITNESS: Okay. 5 MR. ALPER: Then let's also 6 mark as Exhibit 22, tab 66, the settlement 7 agreement. 8 (Exhibit 22 marked for 9 identification.) 10 THE WITNESS: Okay. 11 BY MR. ALPER: 12 Q. Okay. So let's -- and so let 13 me just first -- let's get oriented. 14 Exhibit 21, that's the 15 March 26, 2018 merger agreement between 16 Rebiotix and Ferring, correct? 17 A. Yes. 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 [REDACTED] 22 [REDACTED] 23 [REDACTED] 24 [REDACTED]</p> <p style="text-align: right;">Page 309</p>

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<p>1</p> <p>[REDACTED]</p> <p>Page 310</p>	<p>1</p> <p>[REDACTED]</p> <p>Page 312</p>
<p>1</p> <p>[REDACTED]</p> <p>Page 311</p>	<p>1</p> <p>[REDACTED]</p> <p>Page 313</p>

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<p>1</p> <p>[REDACTED]</p> <p>Page 314</p>	<p>1</p> <p>[REDACTED]</p> <p>Page 316</p>
<p>1</p> <p>[REDACTED]</p> <p>Page 315</p>	<p>1</p> <p>[REDACTED]</p> <p>Page 317</p>

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1 [REDACTED]
 2 [REDACTED]
 3 Q. Okay.
 4 MR. ALPER: Okay. Let's go off
 5 the record.
 6 THE VIDEOGRAPHER: It is
 7 2:42 p.m. This is the end of Media 8, and we
 8 are off the record.
 9 (Brief recess.)
 10 THE VIDEOGRAPHER: This is the
 11 beginning of Media 9. It is 2:53, and we're
 12 back on the record.
 13 MR. ALPER: Sorry. I had my
 14 speaker off. Did we go back on the record?
 15 THE VIDEOGRAPHER: Yes, we're
 16 on. Sorry.
 17 MR. ALPER: Okay. Great.
 18 Sorry about that.
 19 Okay. I'd like to mark tab 49,
 20 please, as the next exhibit, which is
 21 Exhibit 23.
 22 (Exhibit 23 marked for
 23 identification.)
 24 BY MR. ALPER:

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1 Q. Okay. Mr. Berman, Exhibit 23
 2 is numbered BERMAN 7544.
 3 A. Yes.
 4 Q. And it's an e-mail from you to
 5 Howard Sterling dated May 26, 2014, and the
 6 subject is "Rebiotix Material"; is that
 7 correct?
 8 A. Yes.
 9 Q. And it attaches a Rebiotix
 10 slide deck, correct?
 11 A. Correct.
 12 Q. And who is Howard Sterling?
 13 A. I don't recall.
 14 Q. If we look at the Rebiotix
 15 slide deck, which starts on the third page of
 16 the exhibit -- it's BERMAN 7546 -- the deck
 17 is called "Rebiotix: Harnessing the Power of
 18 the Human Gut Microbiome," correct?
 19 A. Correct.
 20 Q. And it's dated April 2014,
 21 right?
 22 A. Yes.
 23 Q. Who authored this PowerPoint?
 24 A. I don't know.

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1 Q. Were you involved in preparing
 2 the Rebiotix PowerPoint that's Exhibit 23?
 3 A. I don't recall.
 4 Q. The Rebiotix PowerPoint that's
 5 Exhibit 23 from April 2014, this was a
 6 business plan-type document that was for
 7 purposes of describing the company's plan to
 8 potential investors?
 9 A. I'm taking a look at it. Hold
 10 on. Yes.
 11 Q. Let's take a look at page 2 of
 12 the Rebiotix April 2014 slide deck, and the
 13 slide there is titled "Rebiotix - Microbiome
 14 Therapy for GI Disease," correct?
 15 A. Yes.
 16 Q. And the first bullet says,
 17 "Founded in 2011 to treat disease using the
 18 Human Gut Microbiome."
 19 Do you see that?
 20 A. Yes.
 21 Q. And that's referring to
 22 Rebiotix. It's saying Rebiotix was founded
 23 in 2011, correct?
 24 A. Right.

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1 Q. And the founding of Rebiotix
 2 was after the Hlavka FMT project at ConcepTx
 3 was discontinued, correct?
 4 A. Correct.
 5 Q. If you go down two bullets,
 6 there's a bullet that says, "1st mover to
 7 commercialize this new class of biologic
 8 drugs in U.S."
 9 Do you see that?
 10 A. Yes.
 11 Q. And this is where you're
 12 reporting to investors or potential investors
 13 that Rebiotix is the -- has the first-mover
 14 advantage in the FMT space, correct?
 15 A. Correct.
 16 Q. And as we discussed earlier,
 17 that's one of the keys to obtaining
 18 investment, right?
 19 MS. SEVERANCE: Objection.
 20 Form.
 21 THE WITNESS: Yes.
 22 BY MR. ALPER:
 23 Q. If we go to slide 7, slide 7 is
 24 titled "Rebiotix Initial MRT Target -

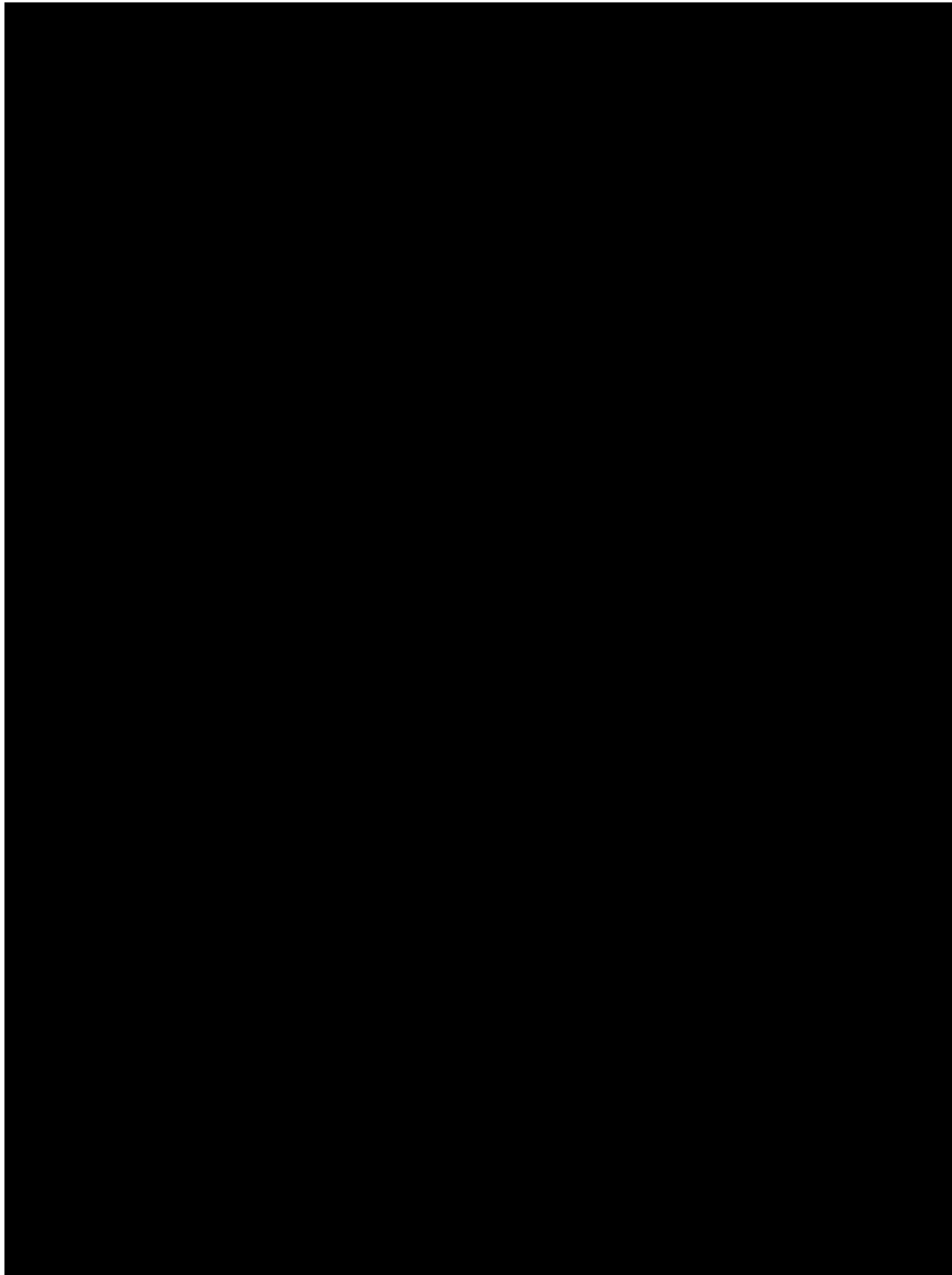
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EXHIBIT 18 - OPPOSITION
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<p>1 back on the record. 2 BY MR. ALPER: 3 Q. When you were at Rebiotix, do 4 you believe Rebiotix did what it should have 5 to respect the intellectual property rights 6 of Dr. Borody and the University of 7 Minnesota? 8 MS. SEVERANCE: Objection. 9 Form. 10 THE WITNESS: Yes. 11 BY MR. ALPER: 12 Q. Do you think that every 13 start-up business -- withdrawn. 14 Do you think that every 15 business needs a story? 16 MS. SEVERANCE: Objection. 17 Form. 18 THE WITNESS: I don't know what 19 you're talking about. 20 BY MR. ALPER: 21 Q. Did you have any involvement in 22 the filing of this -- withdrawn. 23 Did you have any involvement in 24 the decision to file this lawsuit?</p> <p style="text-align: right;">Page 338</p>	<p>1 confidential, too. We'll get in touch if 2 there's anything further there. But I agree. 3 Thank you very much, 4 Mr. Berman, for your time. 5 THE WITNESS: Thank you. 6 THE VIDEOGRAPHER: It is 7 3:26 p.m. This is the end of Media 11 and 8 also conclusion of this deposition, and we 9 are going off the record. 10 (The deposition concluded at 3:26 p.m. EDT.) 11 * * * * * 12 13 14 15 16 17 18 19 20 21 22 23 24</p> <p style="text-align: right;">Page 340</p>
<p>1 A. No. 2 MR. ALPER: Okay. All right. 3 I -- those are all the questions that I have. 4 MS. SEVERANCE: Okay. Let's 5 just take a short few-minute break and then 6 we'll come back on. 7 THE VIDEOGRAPHER: Okay. It is 8 3:24. This is the end of Media 10, and we're 9 off the record. 10 (Brief recess.) 11 THE VIDEOGRAPHER: This is the 12 beginning of Media 11. It is 3:26, and we 13 are back on the record. 14 MS. SEVERANCE: I have no 15 questions for the witness. I would like to 16 thank him for his time. I would also like to 17 mark the transcript "Highly Confidential 18 under the Protective Order." 19 MR. ALPER: Oh, sorry. We 20 should probably do that. We'll just 21 prophylactically, if there's any -- I'm not 22 sure that there was -- whether there was any 23 of our side's information in this deposition, 24 but if there was, we should mark that as</p> <p style="text-align: right;">Page 339</p>	<p>1 2 C E R T I F I C A T I O N 3 4 I, Patricia R. Frank, a Registered Merit 5 Reporter, Certified Realtime Reporter, and Notary 6 Public of the State of Delaware, do hereby certify 7 that I reported the deposition in the 8 above-captioned matter; that the said witness was 9 duly sworn by me; that the foregoing is a true and 10 correct transcript of the stenographic notes of 11 testimony taken by me in the above-captioned matter. 12 I further certify that I am not an 13 attorney or counsel for any of the parties, nor a 14 relative or employee of any attorney or counsel 15 connected with the action, nor financially 16 interested in the action. 17 18  19 Patricia R. Frank, RMR #9764 20 21 22 Dated: May 12, 2023 23 24</p> <p style="text-align: right;">Page 341</p>

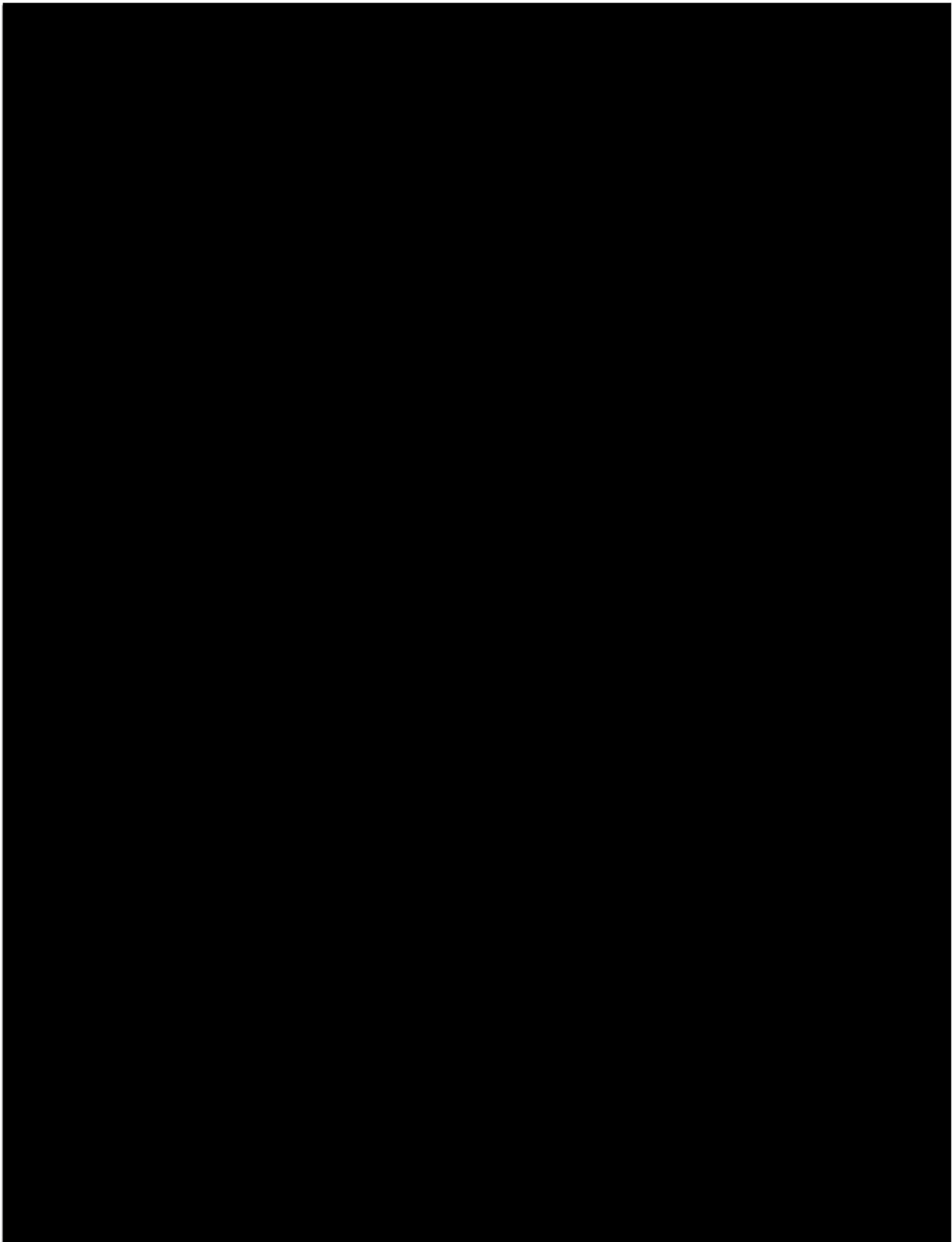
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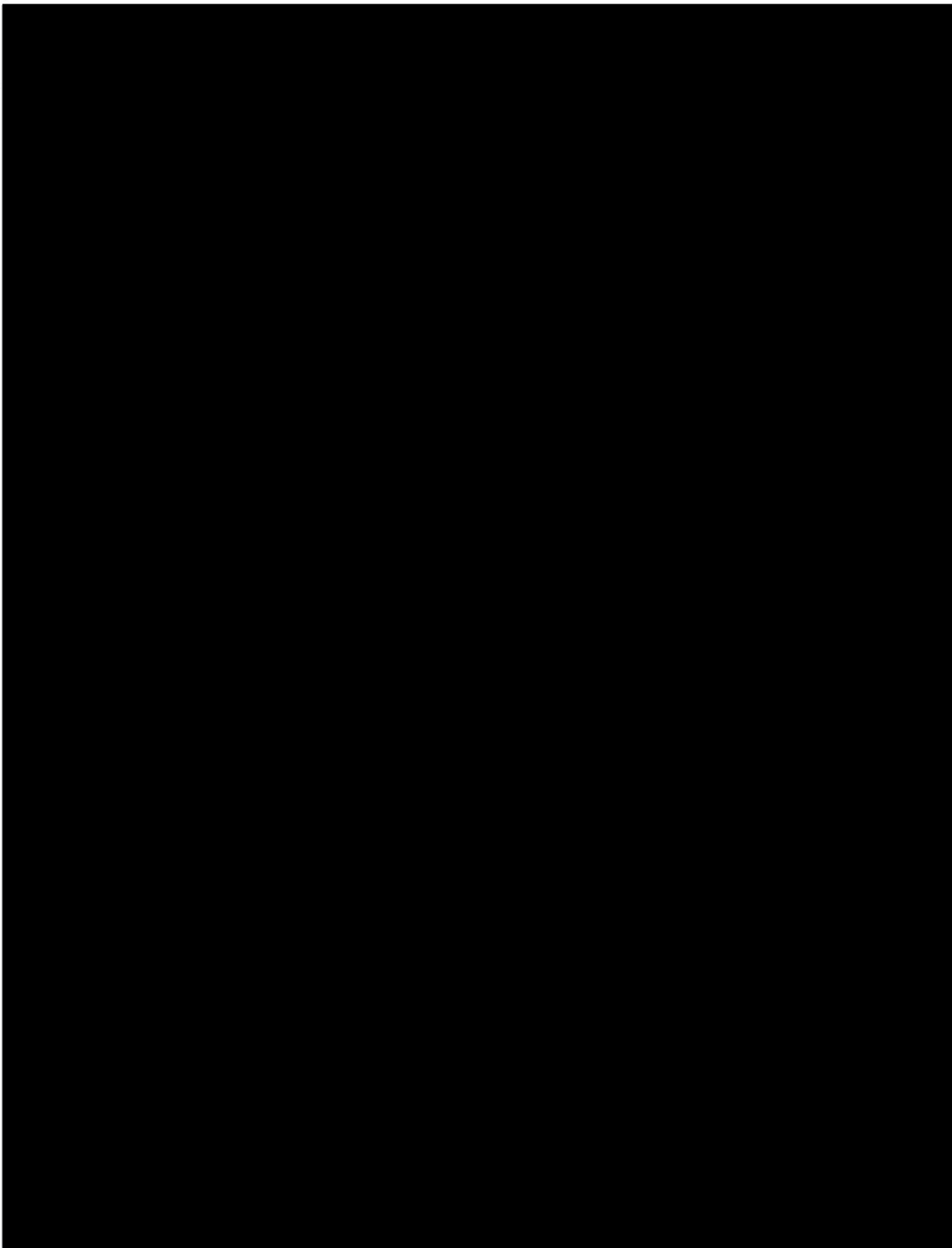
Execution Version



PTX-57

Ferring Pharmaceuticals Inc.
v. Finch Therapeutics Grp.,
Inc., C.A. No. 21-1694 (JLH)





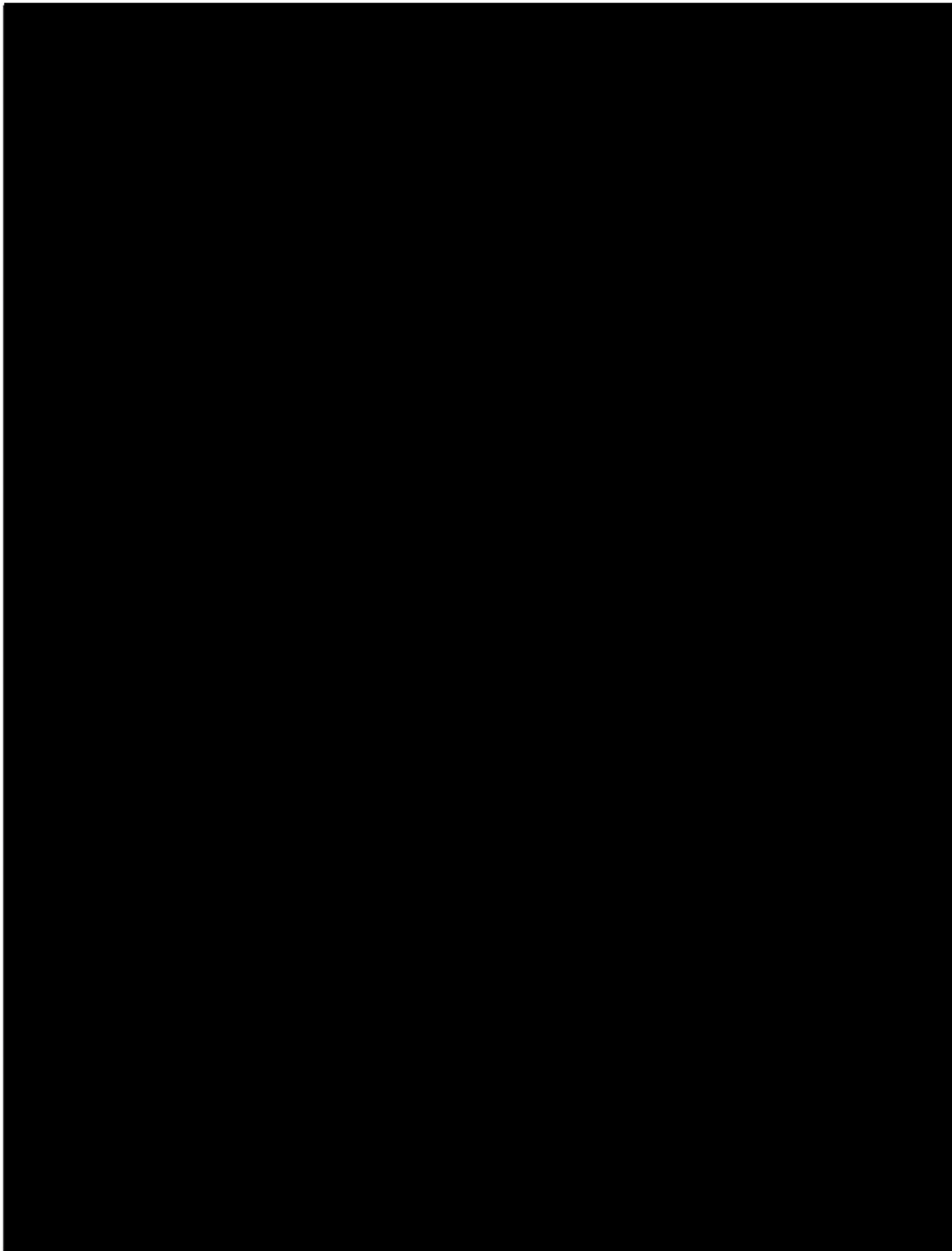
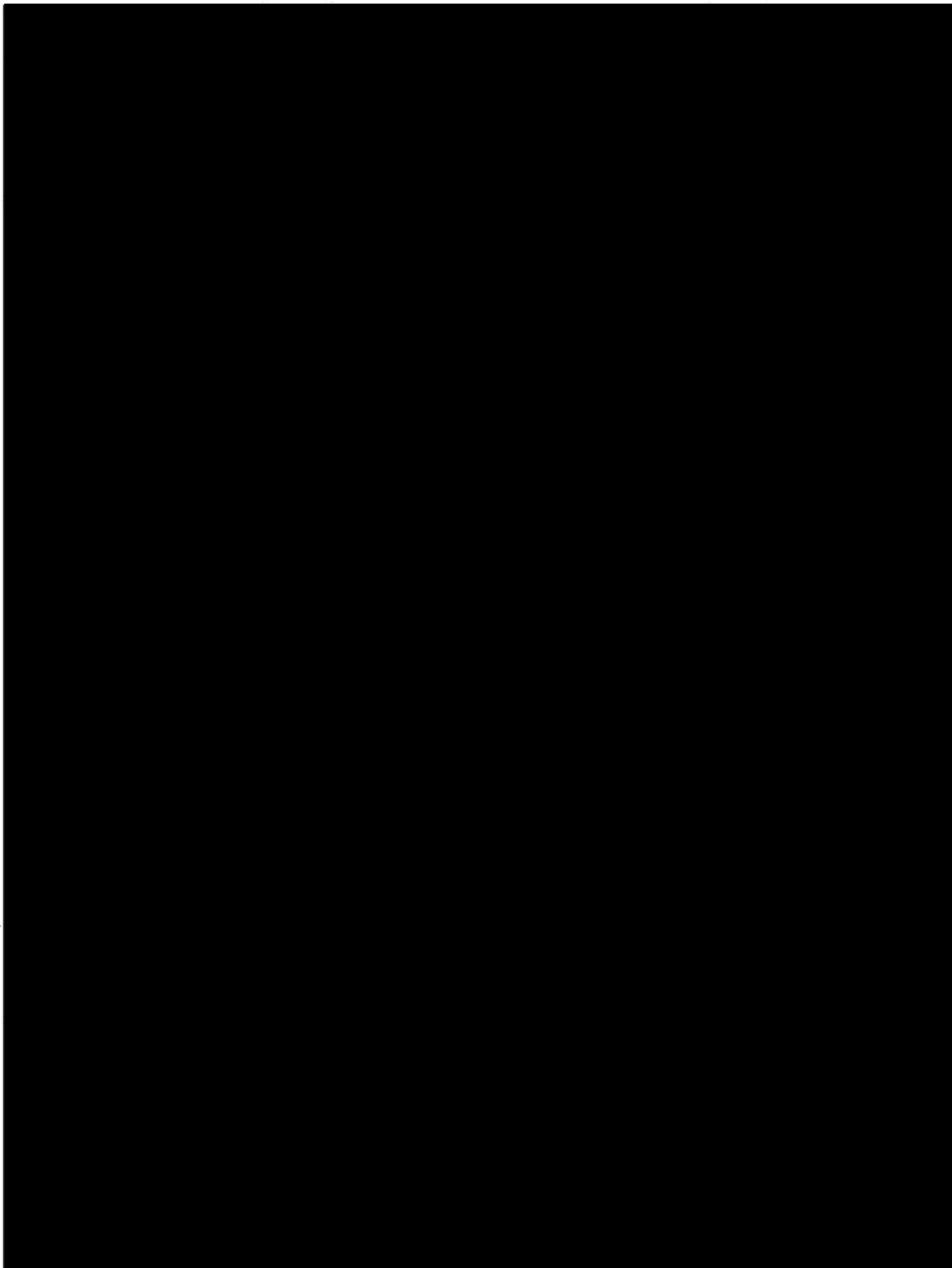
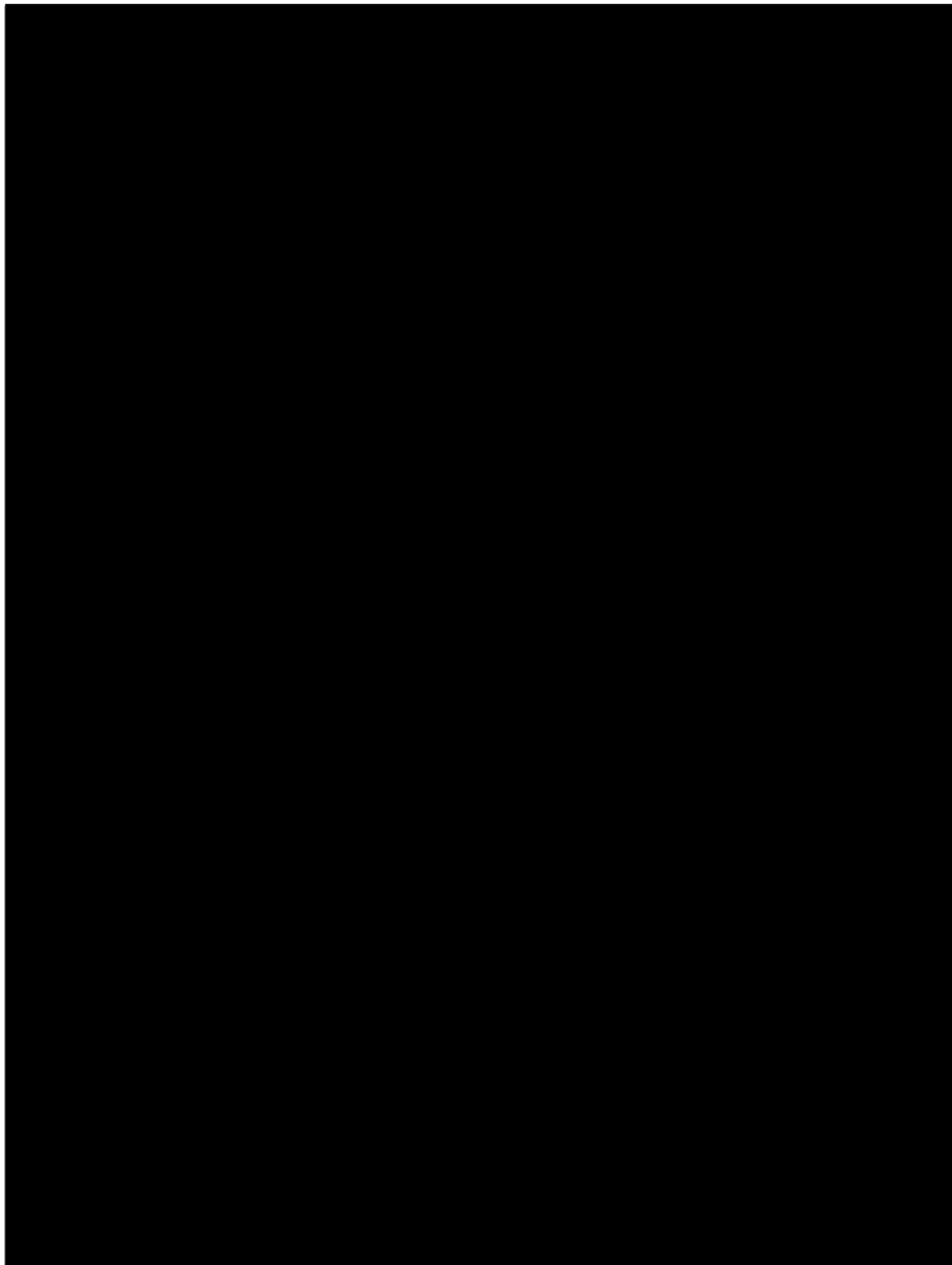
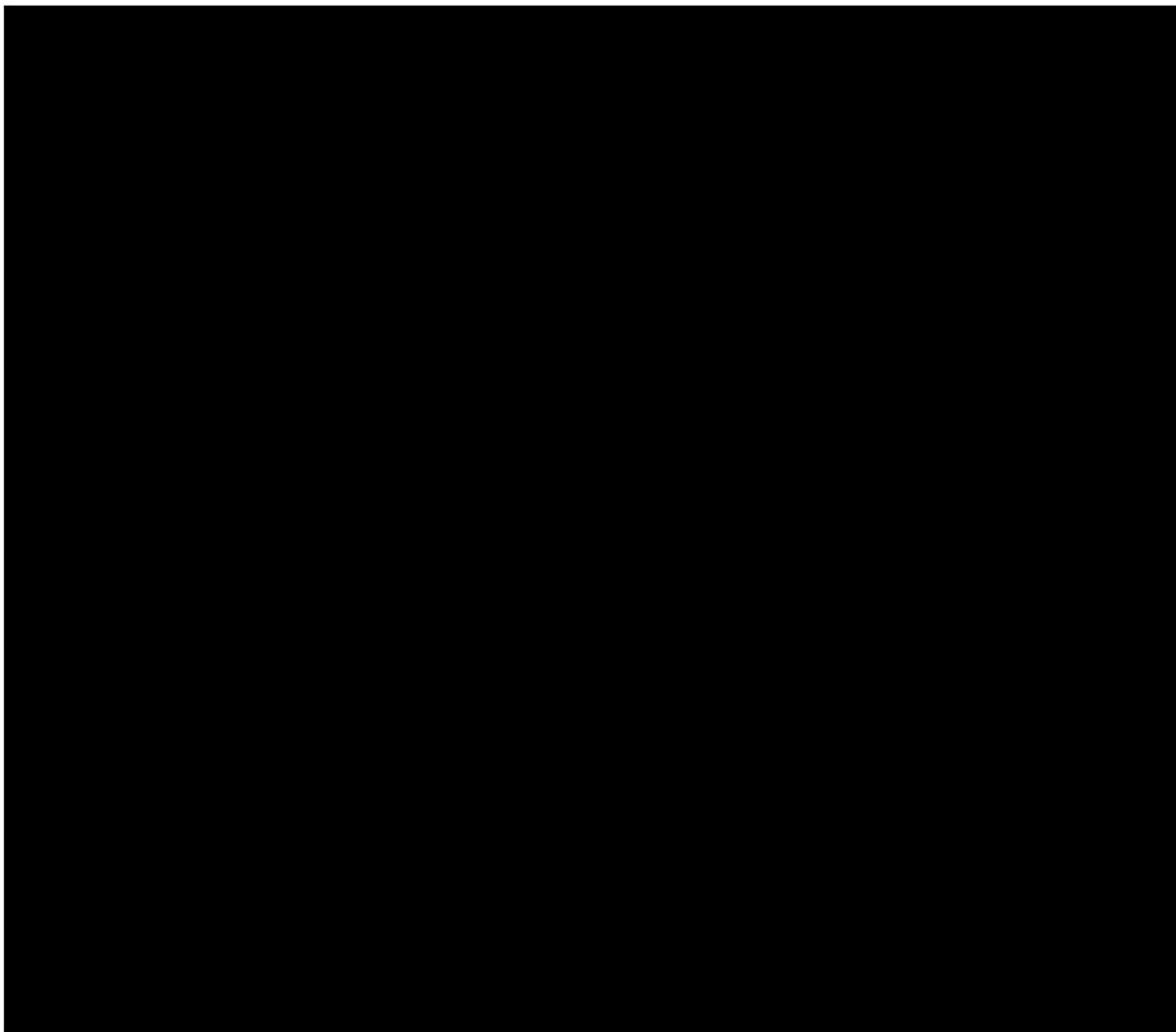


EXHIBIT 18-2 - OPPOSITION







* * *

IN WITNESS WHEREOF, each of the Parties has caused this Settlement Agreement to be executed by its duly authorized representative as of the day and year first above written.

FERRING HOLDING INC.

By: 

Name: Brent Ragans

Title: President


Name: Jeff McCowaghy

Title: Chief Financial Officer

REBIOTIX INC.

By: 

Name: Brent Ragans

Title: President


Name: Jeff McCowaghy

Title: Chief Financial Officer

REBIOTIX REPRESENTATIVE, LLC

By:

Name: Erwin Kelen

Title: Sellers' Representative

SIGNATURE PAGE TO SETTLEMENT AGREEMENT

IN WITNESS WHEREOF, each of the Parties has caused this Settlement Agreement to be executed by its duly authorized representative as of the day and year first above written.

FERRING HOLDING INC.

By:

Name:
Title:

Name:
Title:

REBIOTIX INC.

By:

Name:
Title:

REBIOTIX REPRESENTATIVE, LLC

By:



Name: Erwin Kelen
Title: Sellers' Representative

SIGNATURE PAGE TO SETTLEMENT AGREEMENT

PTX-204 (EXCERPTS)

CONFIDENTIAL – DO NOT SHARE

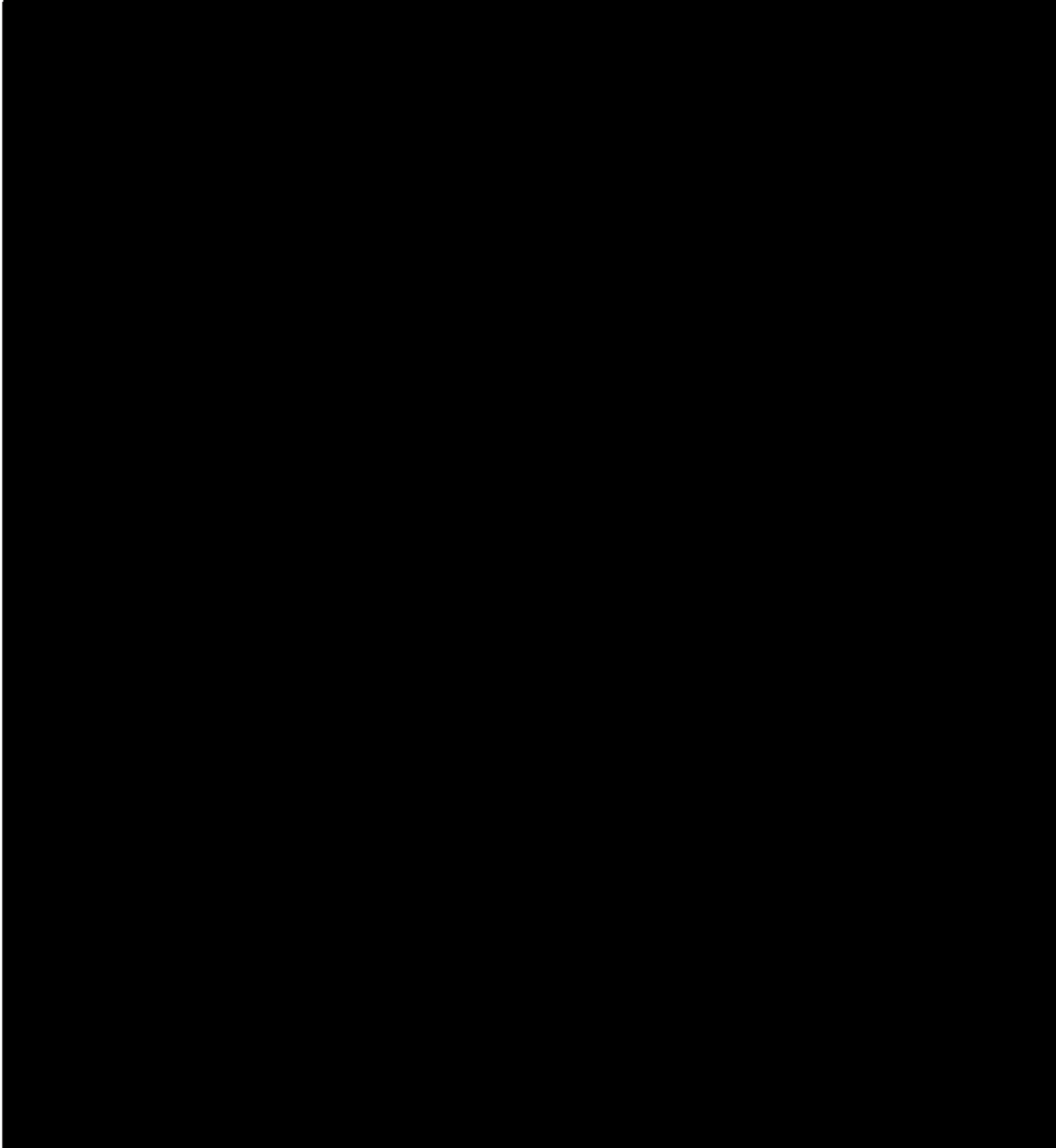


PTX-204

Ferring Pharmaceuticals Inc.
v. Finch Therapeutics Grp.,
Inc., C.A. No. 21-1694 (JLH)

INFORMATION STATEMENT

March 27, 2018



HIGHLY CONFIDENTIAL
INFORMATION

FER_RBX02797880

PTX-204.0001

The Board of Directors requests that you sign, date and return all of the signature pages in the Signature Page Packet as soon as possible. Please return your signature pages by email to eleanor.wood@stinson.com or by facsimile to 612-335-1657 with Attention: Eleanor Wood, with the originals following by overnight delivery to Stinson Leonard Street LLP, Attention: Eleanor Wood, Esq., 50 South Sixth Street, Suite 2600, Minneapolis, Minnesota, 55402.

The attached Information Statement is confidential. Please do not disseminate the Information Statement except to your personal advisors as necessary to determine whether to grant your consent.

We thank you for your continued support of Rebiotix. If the Merger is approved by all of our Stockholders, Noteholders and Optionholders, and the other closing conditions are met or waived, we expect the Merger to close in late March or early April 2018. If you have any questions, please contact me at 612-961-2956 or Greg Fluet at 307-690-6438.

We will also be holding conference calls at the following dates and times to answer any questions you may have. To join in the conference calls, please dial the following numbers at the start of the call time:

Dial: (641) 715-0712
Enter access code: 347847#

Tuesday, March 27, 2018 at 3:00 p.m. CST
Wednesday, March 28, 2018 at 3:00 p.m. CST
Friday, March 30, 2018 at 9:00 a.m. CST

Thank you for your prompt attention to this request.

Very truly yours,

Lee Jones, President and CEO

The information contained in this Information Statement is highly confidential and the terms of the transaction have not been publicly disclosed. Nothing contained in this Information Statement should be disclosed to any person or used for any purpose other than as expressly contemplated in this Information Statement. Any unauthorized disclosure of this Information Statement or any information contained herein will be deemed by Rebiotix to be a violation of any confidentiality obligations you have to Rebiotix.

Each Stockholder and Noteholder must pursue its own independent evaluation and make such investigation as it deems appropriate in deciding whether to execute the documents described in this Information Statement. The information contained in this Information Statement is not intended to be legal, tax or financial advice. You are strongly advised to consult your own counsel, accountant and financial advisor, as appropriate, as to legal, tax and other matters concerning the merger and the related matters described in this Information Statement.

The information contained in this Information Statement summarizes the more detailed information contained in the Merger Agreement (attached as Exhibit B) and is qualified in its entirety by reference to such document. Stockholders and Noteholders are urged to carefully review the Merger Agreement in its entirety.

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EXHIBITS

Written Consent of Stockholders Approving the Merger and the Amendment	Exhibit A
Agreement and Plan of Merger	Exhibit B
Certificate of Amendment to the Amended and Restated Certificate of Incorporation	Exhibit C
Notice of Stockholder Action by Written Consent Pursuant to Section 228(c) of the DGCL	Exhibit D
Notice of Appraisal Rights Pursuant to Section 262(d)(2) of the DGCL	Exhibit E
Letter of Transmittal (For Stockholders)	Exhibit F-1
Letter of Transmittal (For Noteholders).....	Exhibit F-2
SIGNATURE PAGE PACKET	Exhibit G

EXHIBIT 18 - OPPOSITION

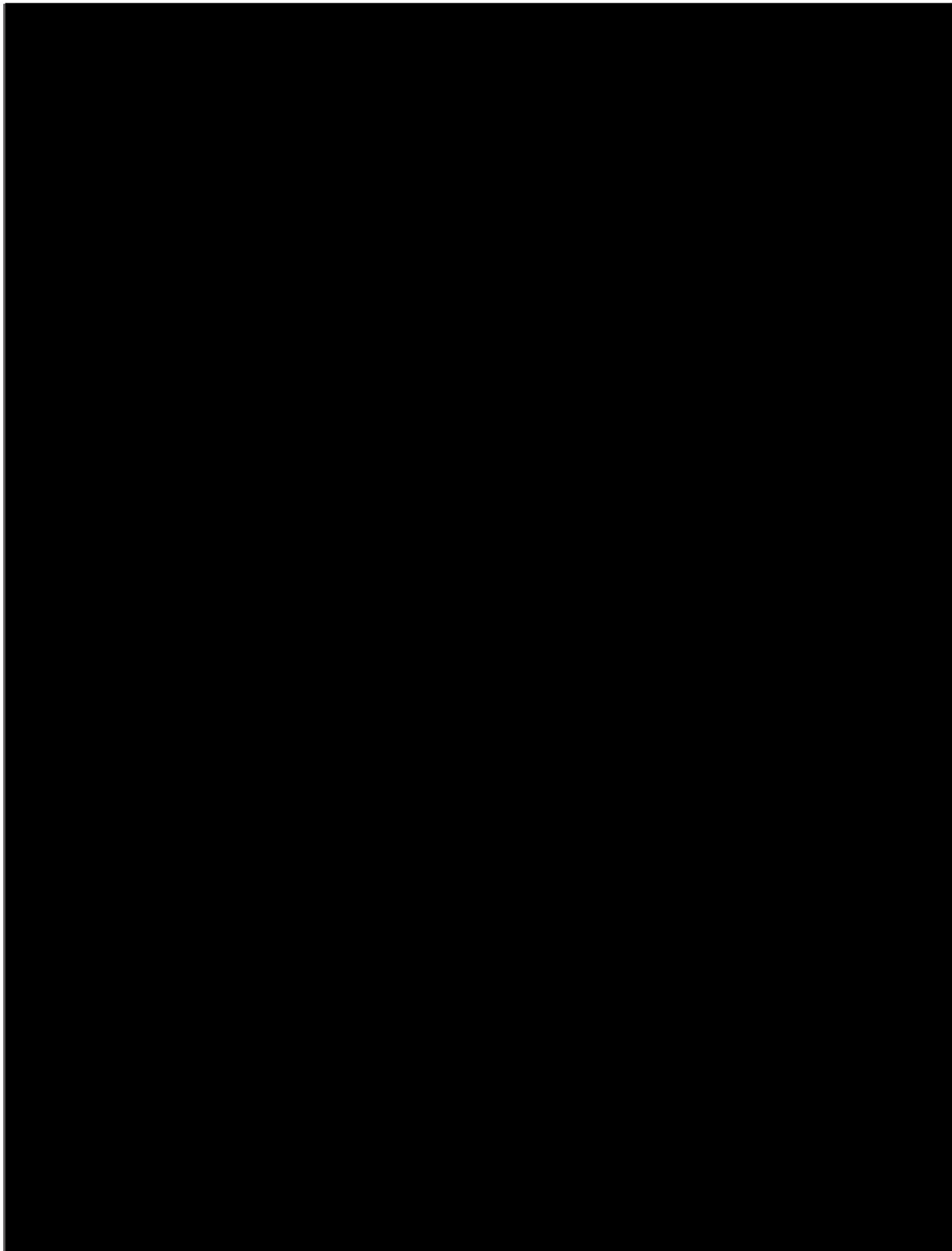


EXHIBIT 18 - OPPOSITION

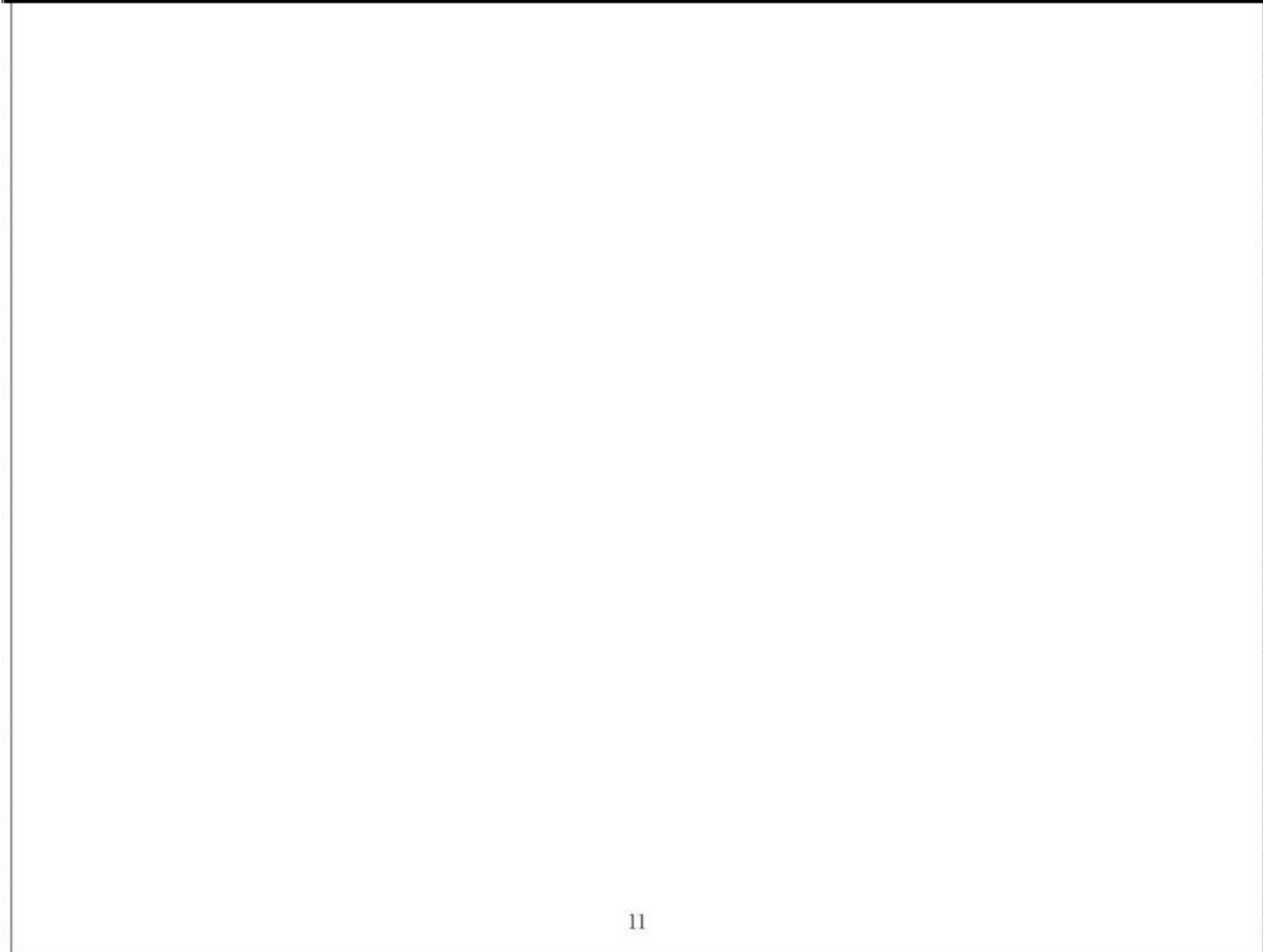
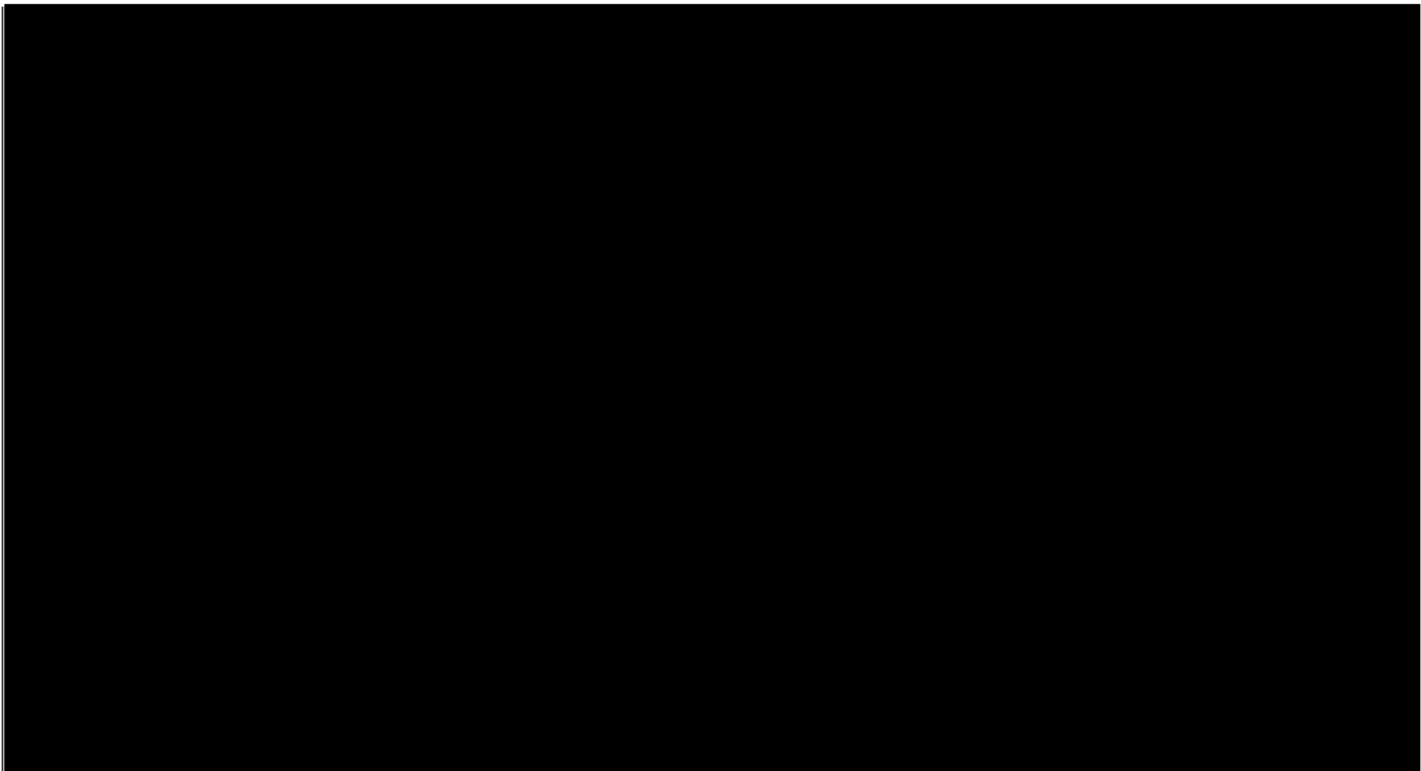


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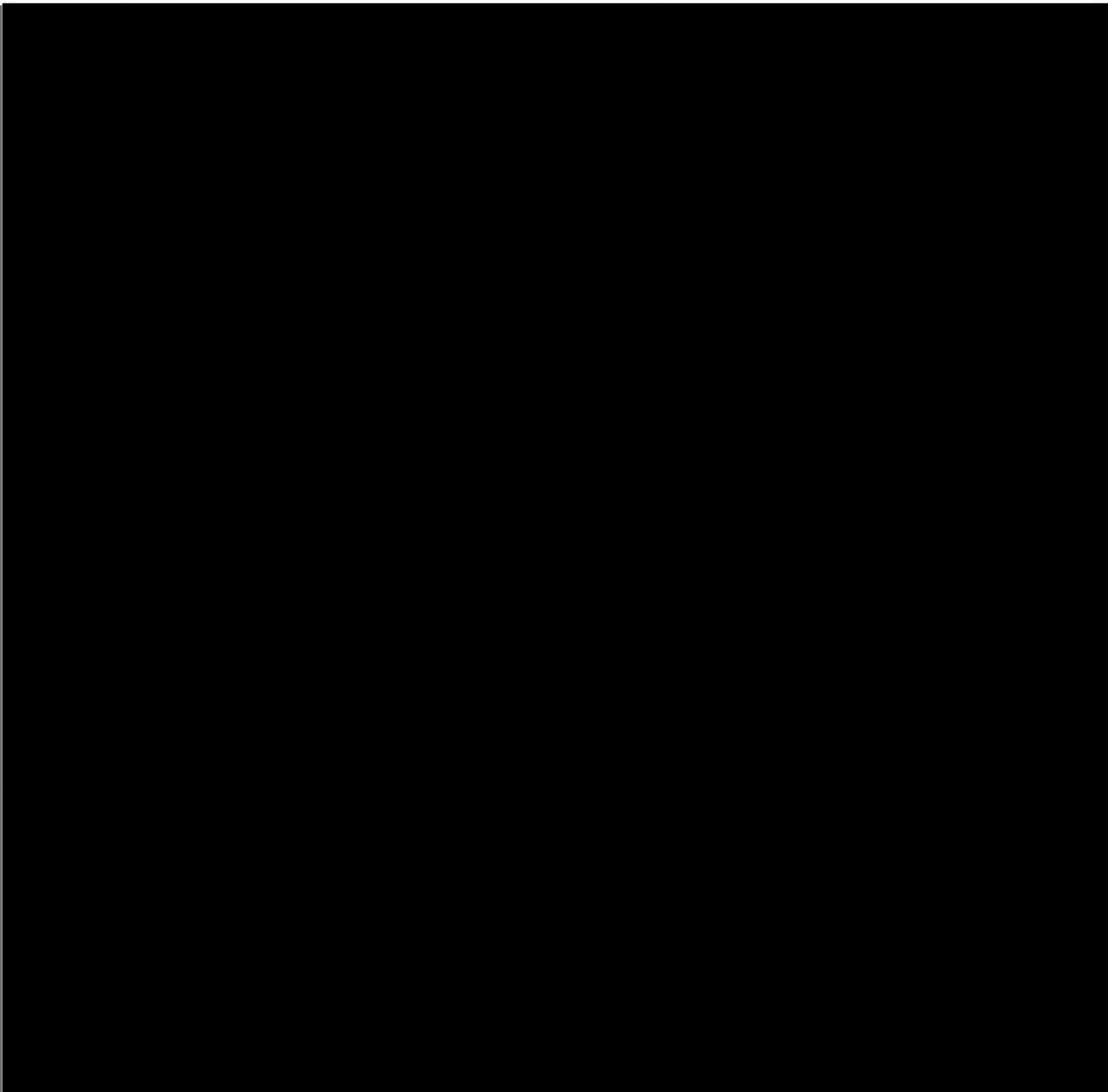
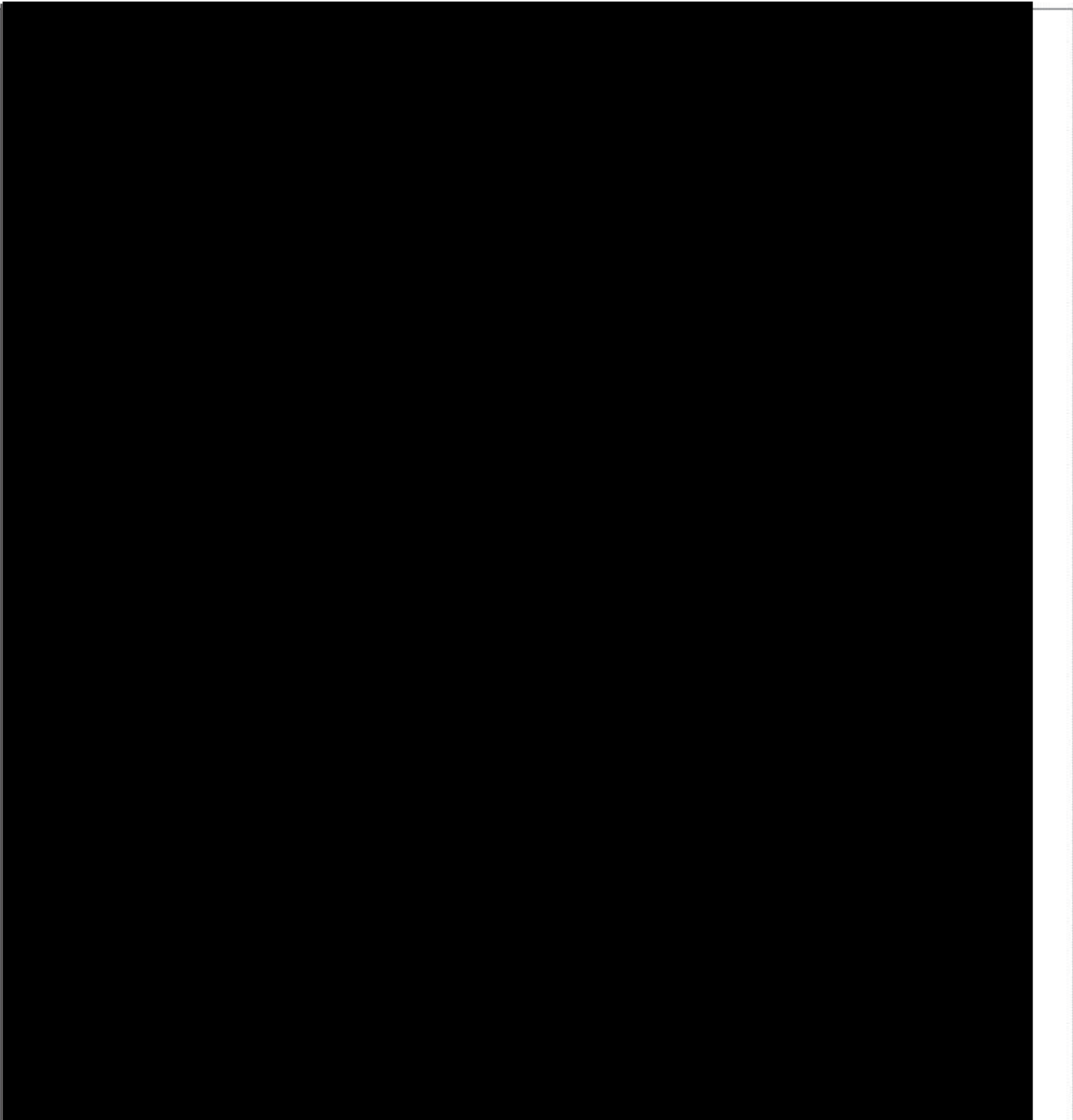
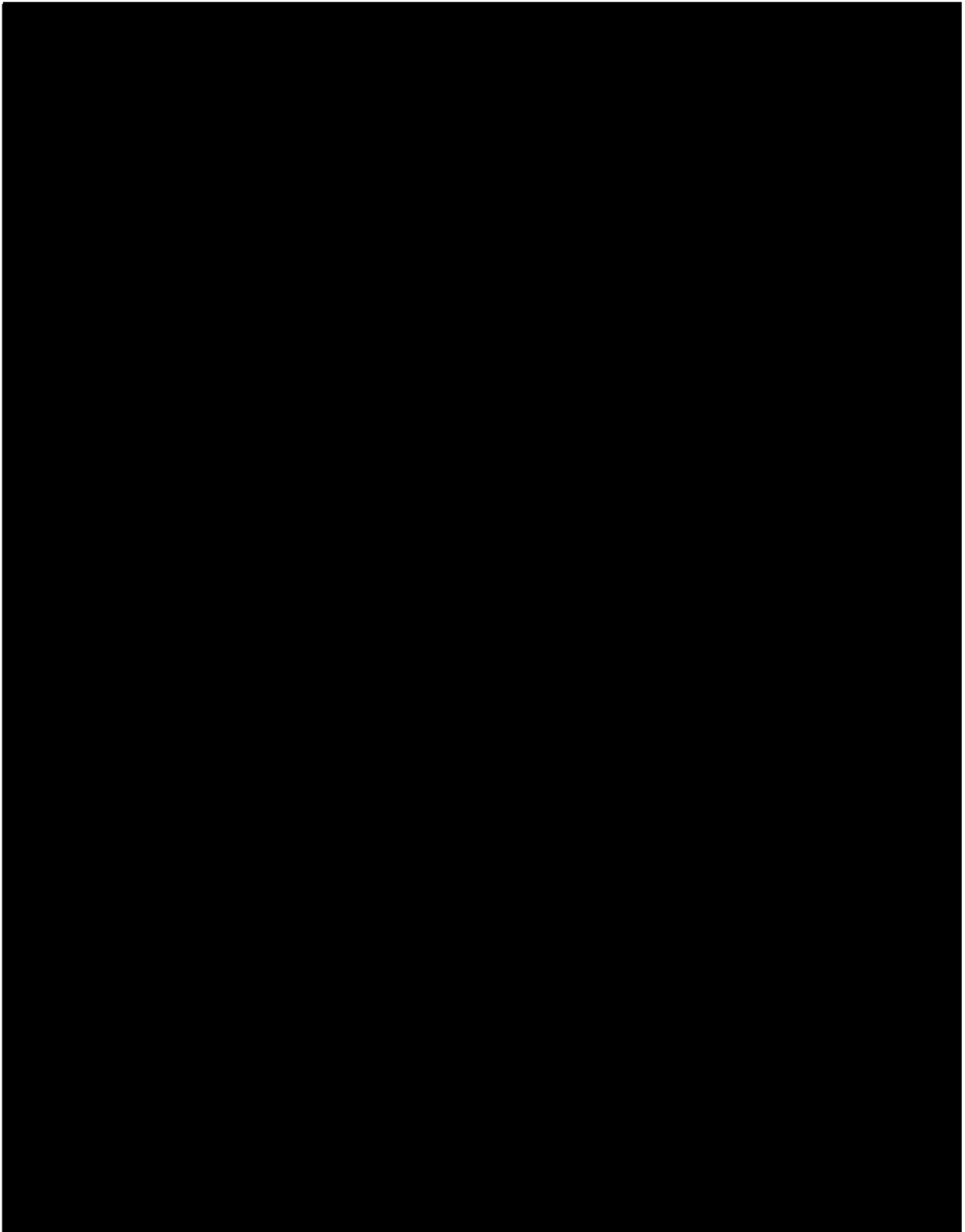


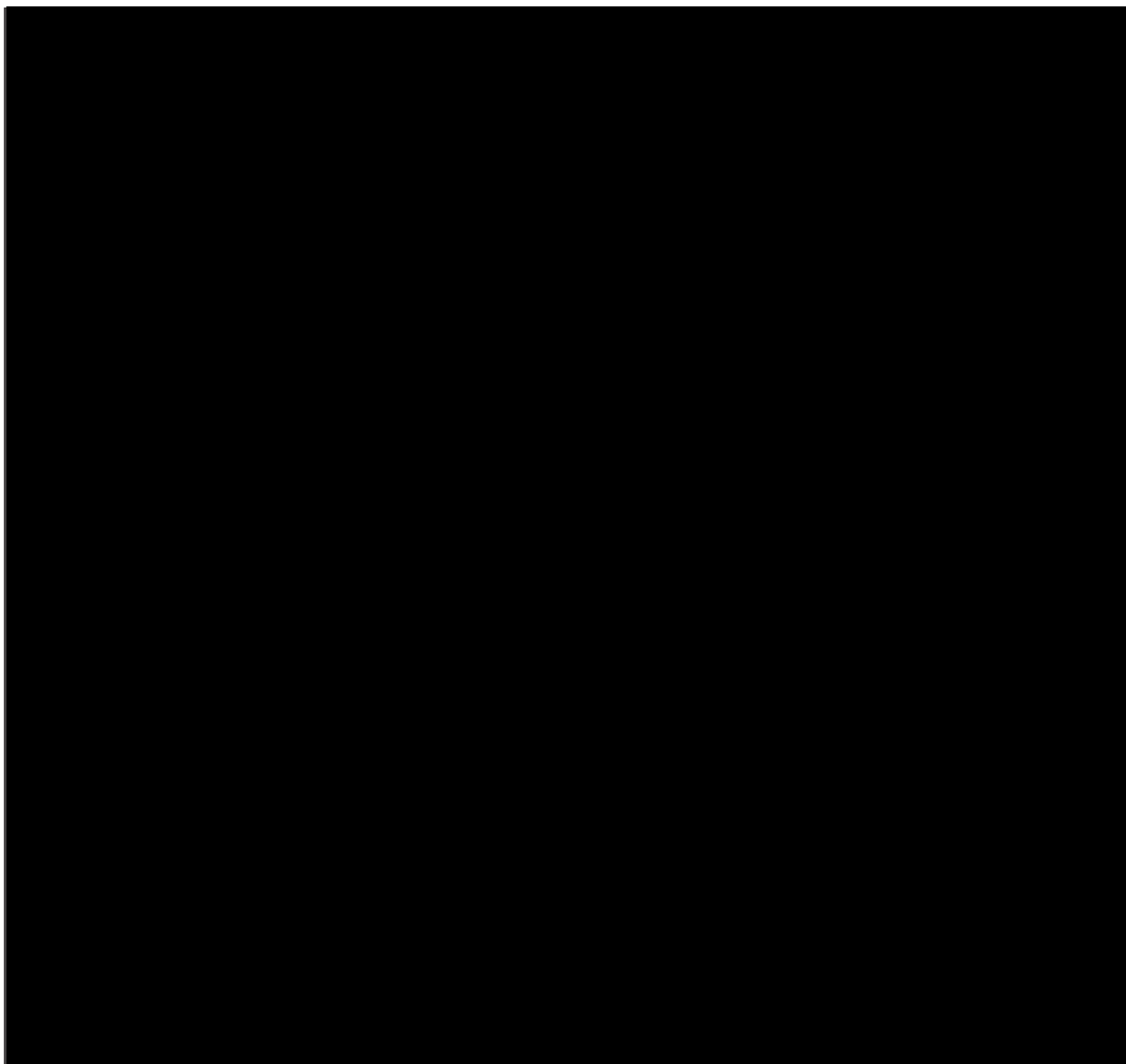
EXHIBIT 18 - OPPOSITION



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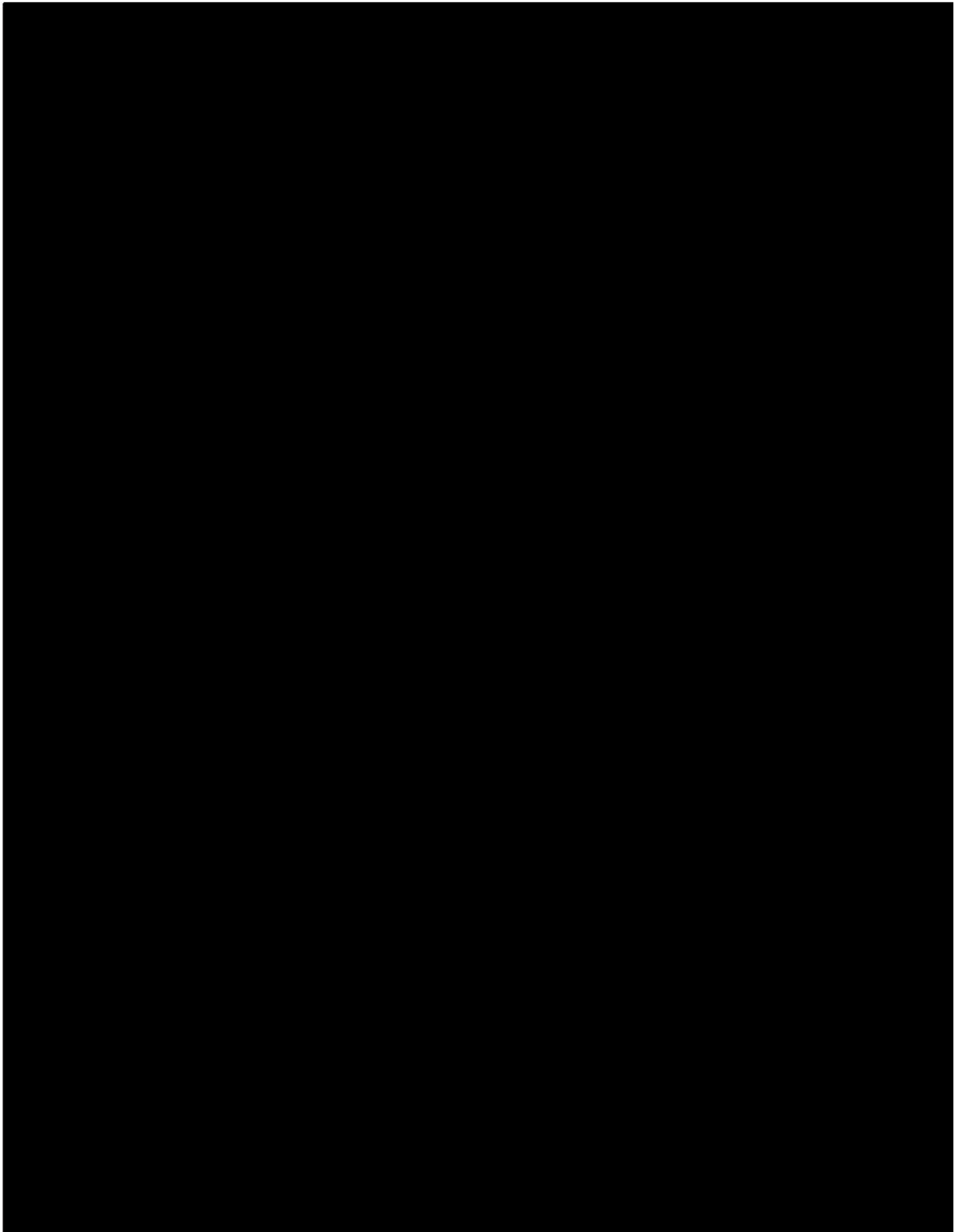


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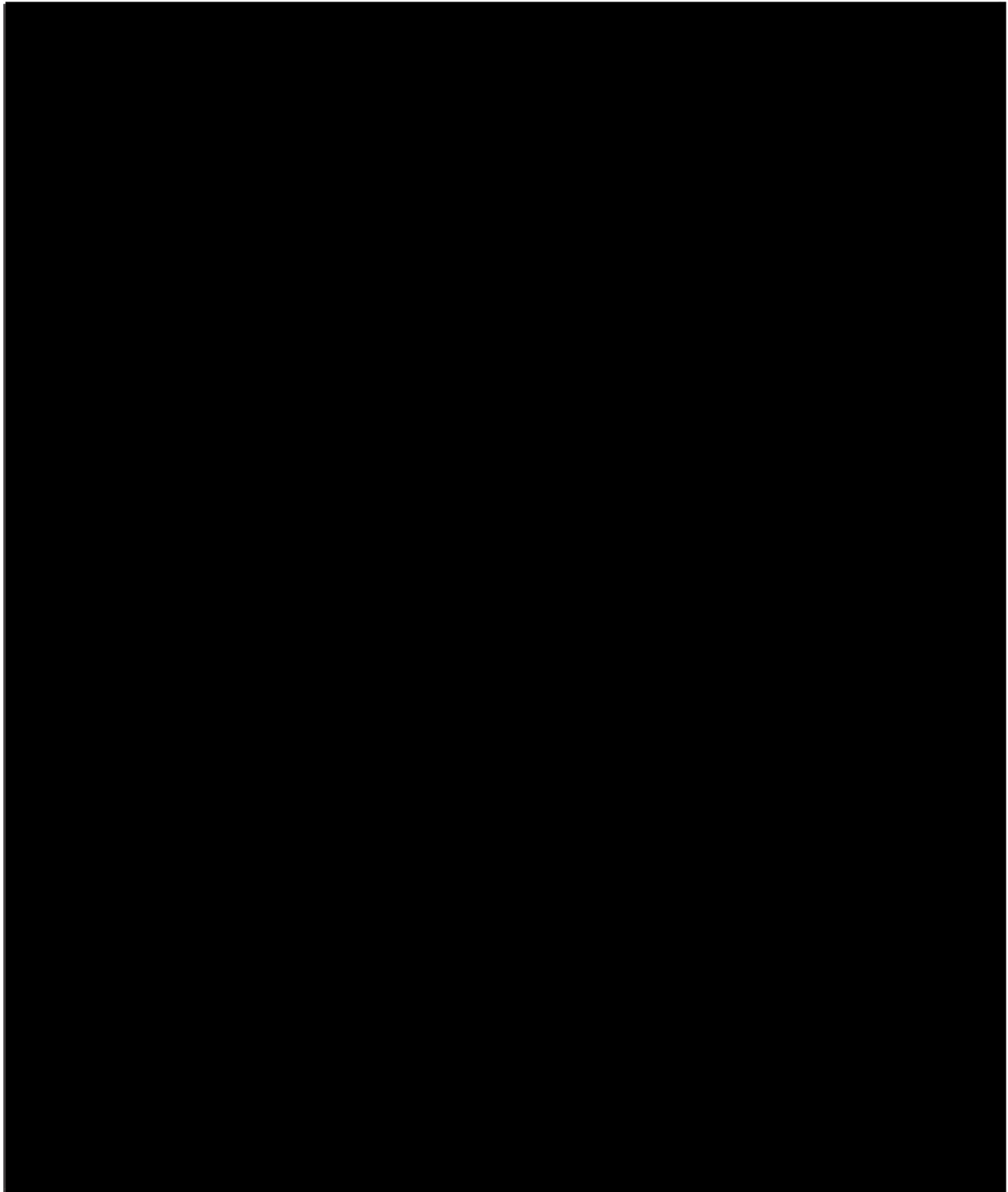


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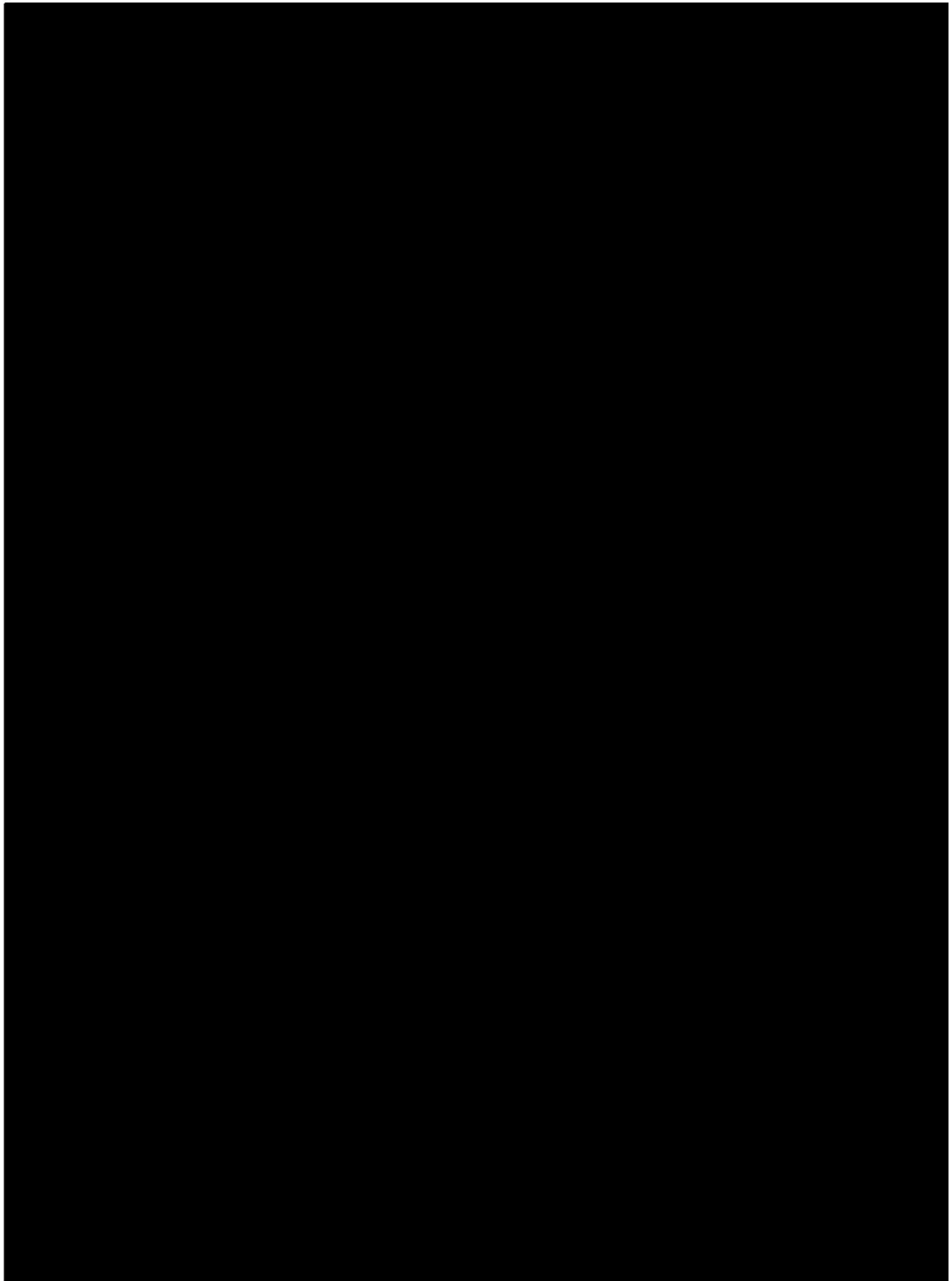


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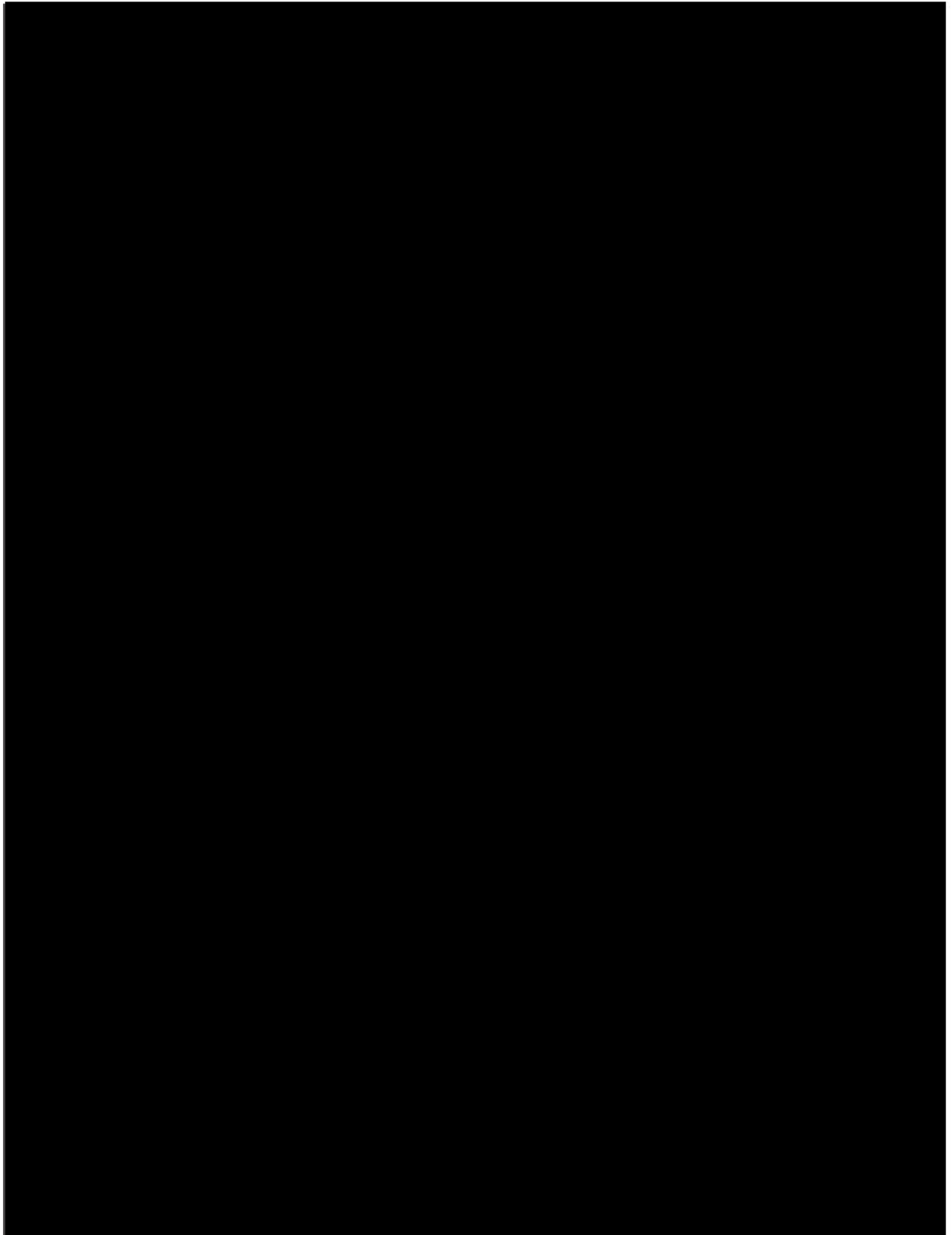


¹ Optionholders will receive Aggregate Consideration on the same terms as Stockholders except as described below.

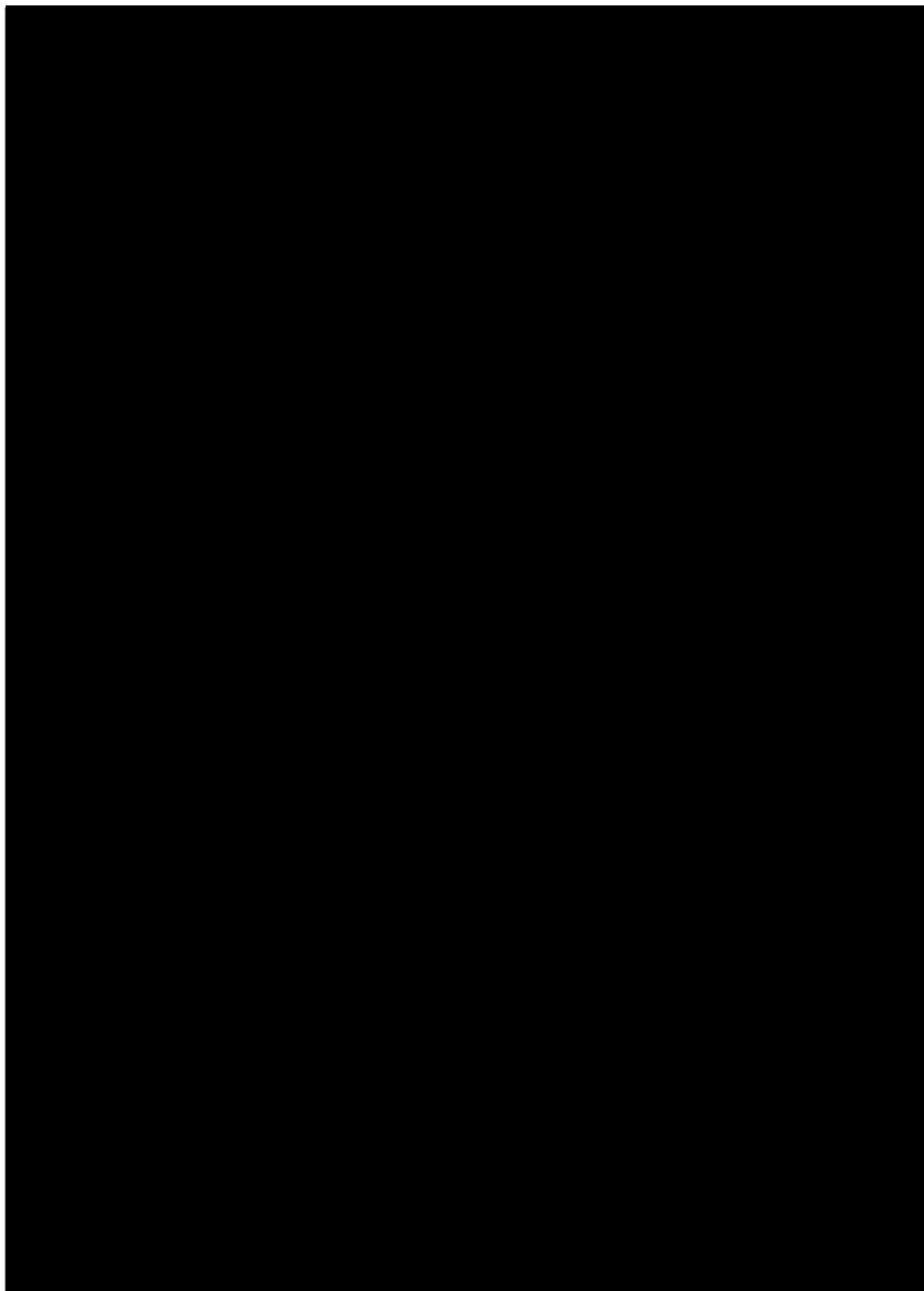
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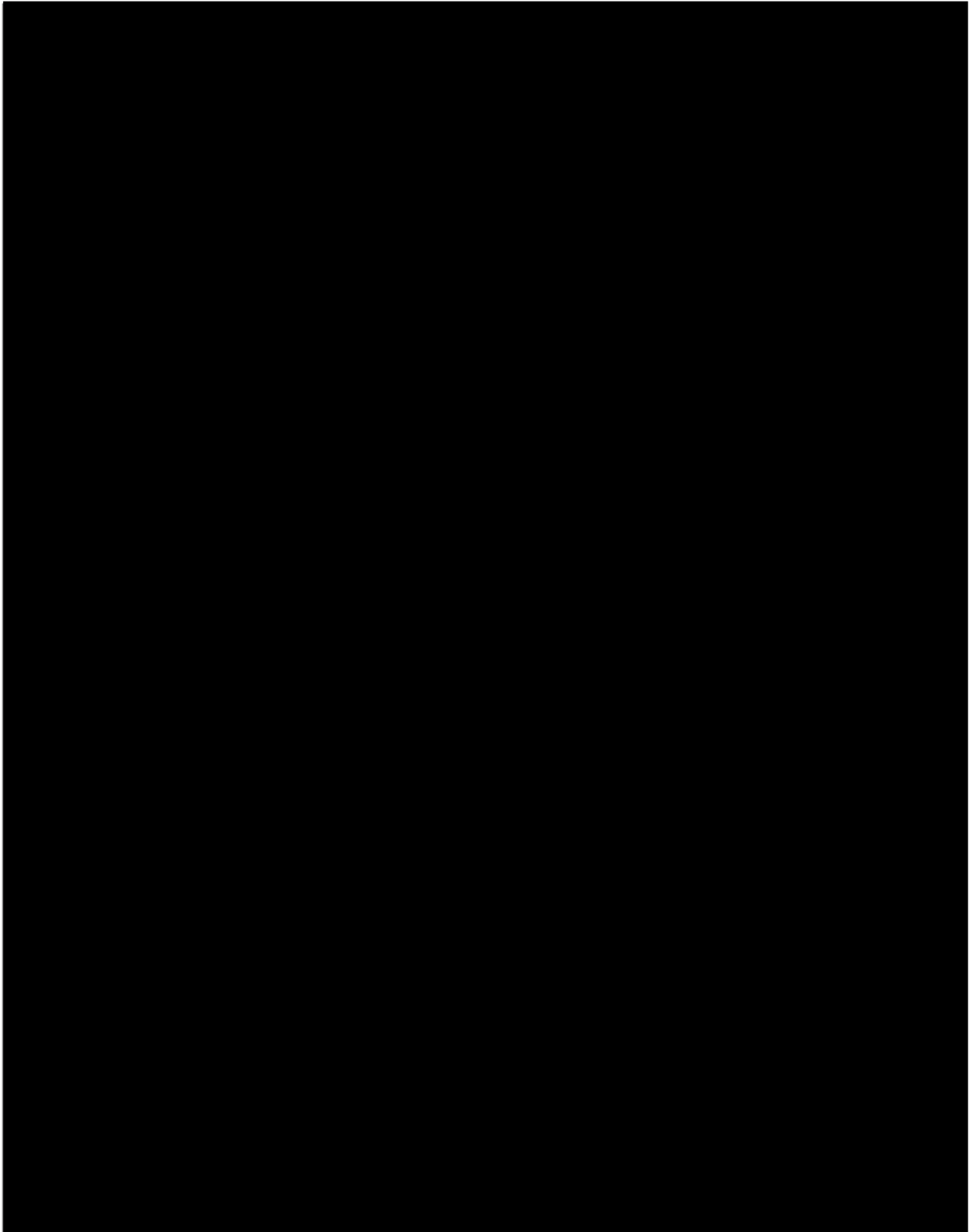
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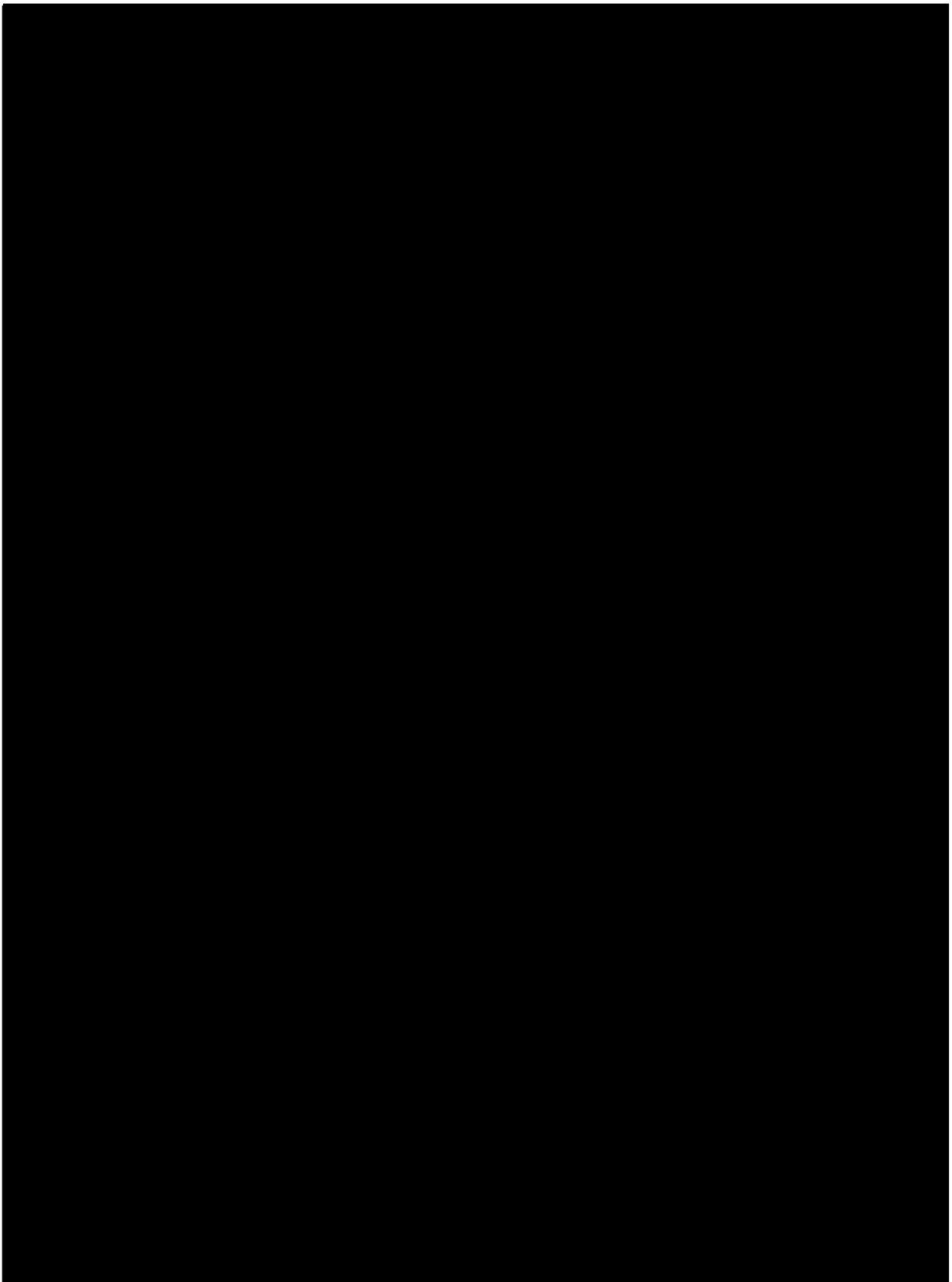
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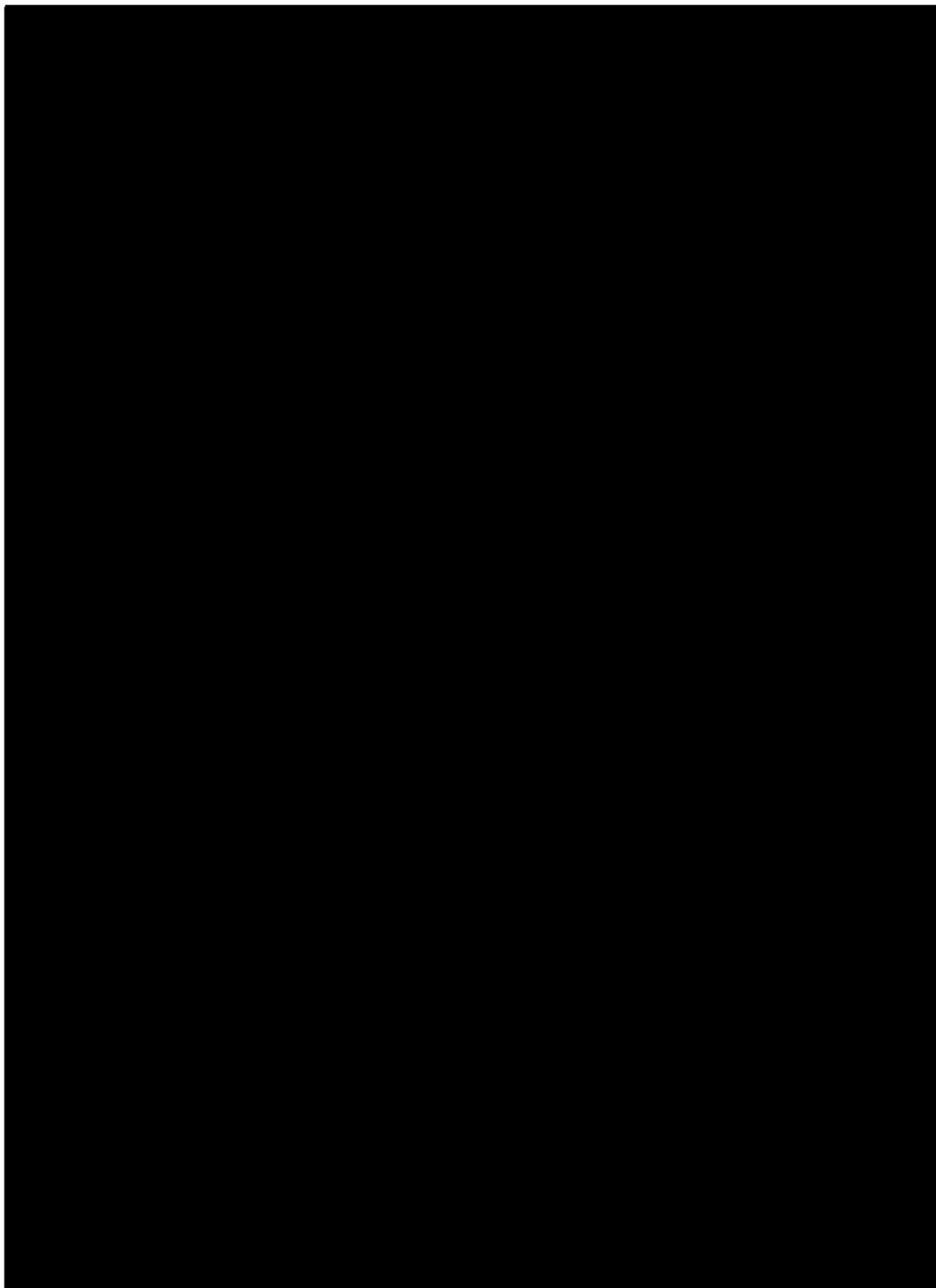
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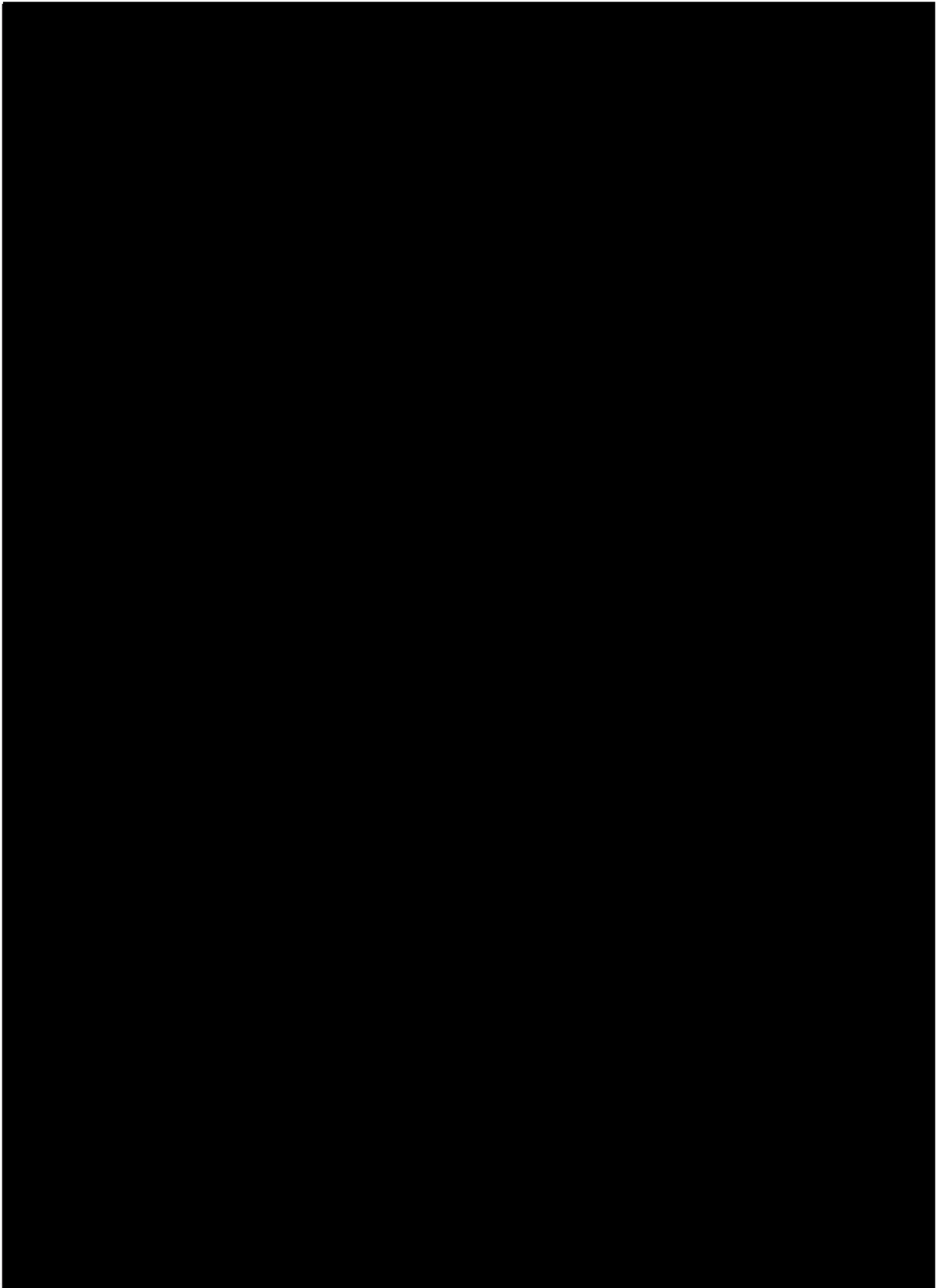
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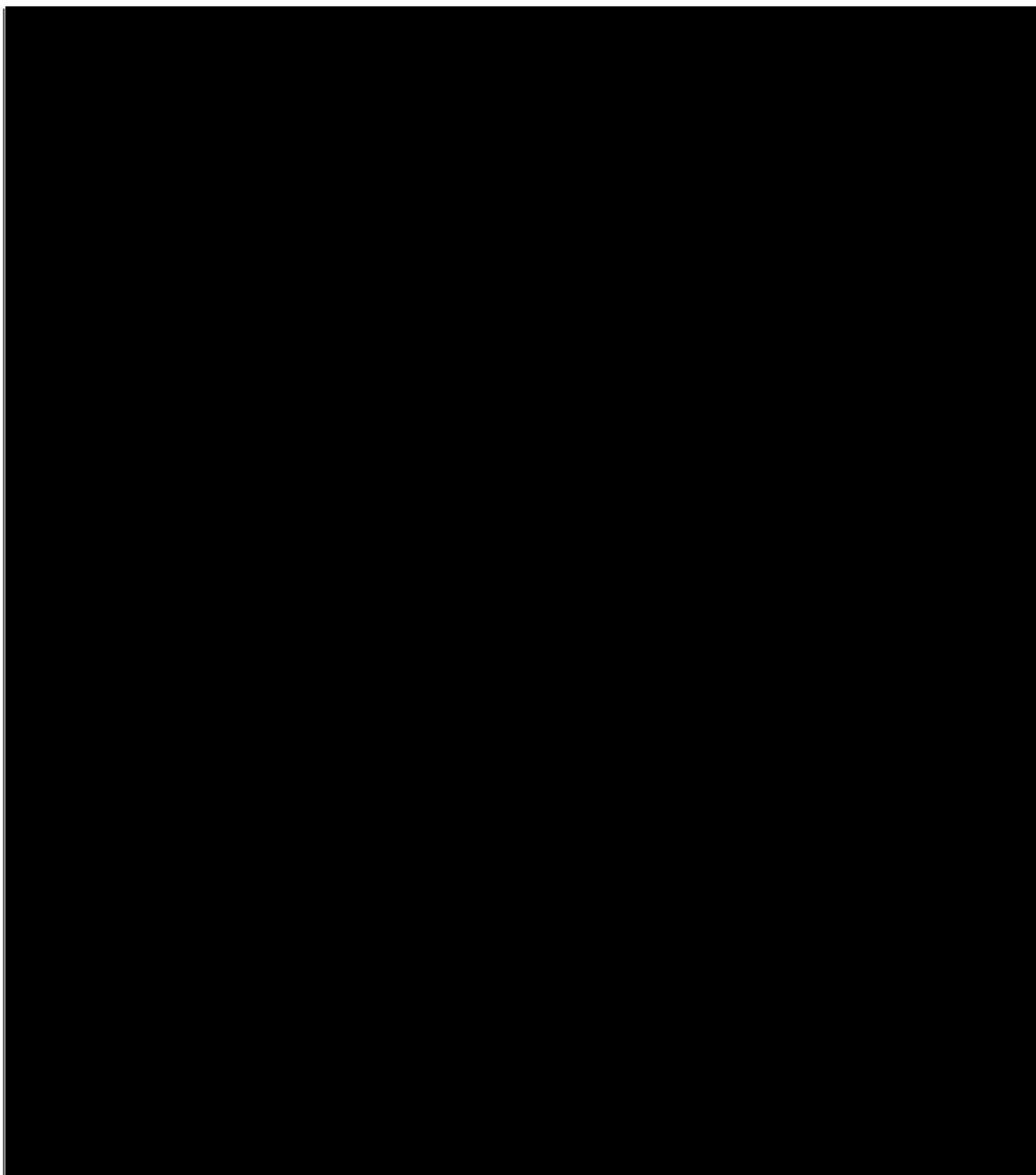
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CONFIDENTIAL – DO NOT SHARE



* * * * *

CONFIDENTIAL - DO NOT SHARE

EXHIBIT B

AGREEMENT AND PLAN OF MERGER

See attached.

EXECUTION VERSION

**AGREEMENT
AND PLAN OF MERGER
BY AND AMONG
FERRING HOLDING INC.;
REBIOTIX MERGER SUB, INC.;
REBIOTIX INC.;
THE SIGNING HOLDERS AND
REBIOTIX REPRESENTATIVE, LLC
(IN ITS SOLE CAPACITY AS THE SELLERS' REPRESENTATIVE).**

Dated as of March 26, 2018

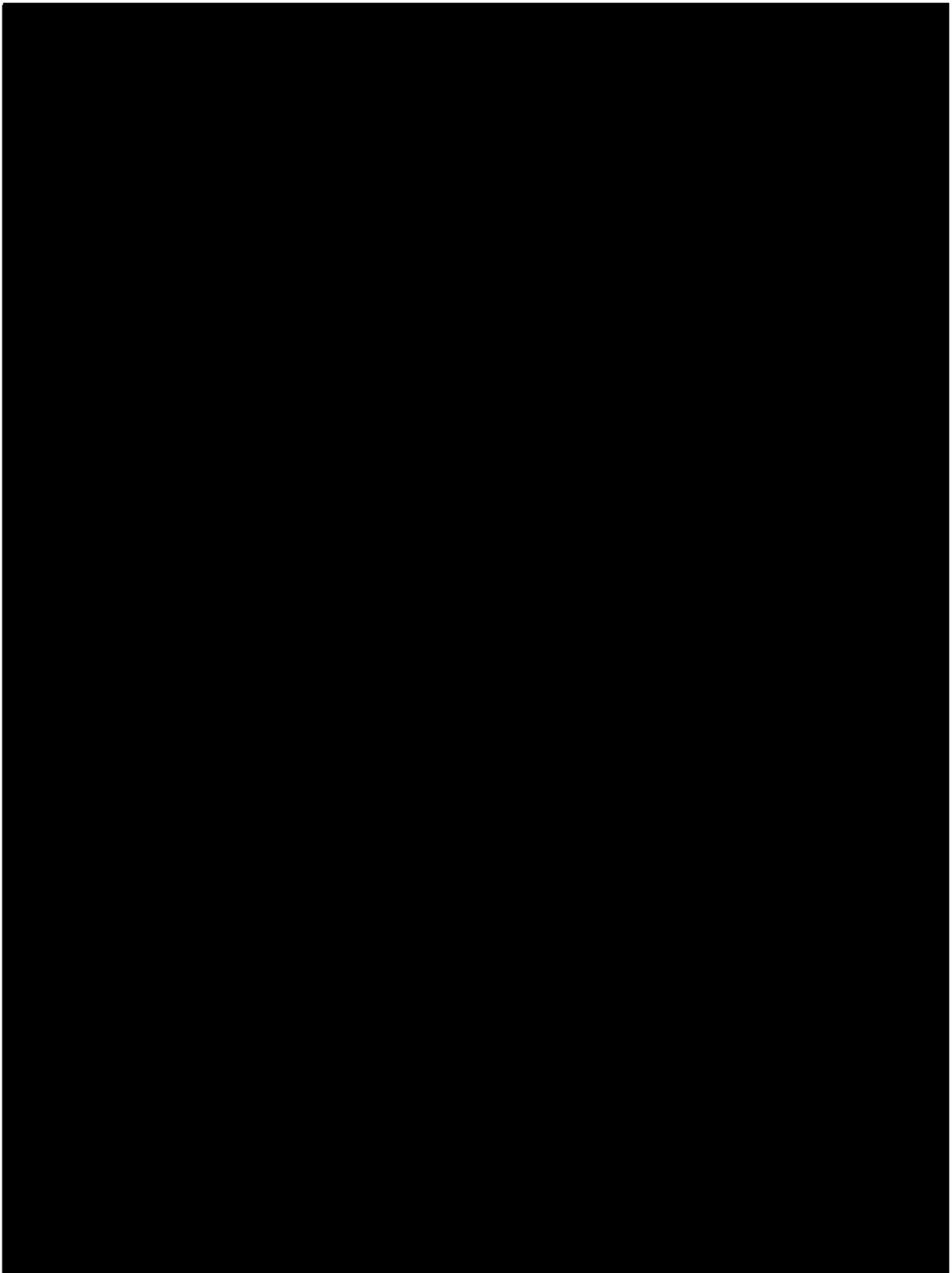
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HIGHLY CONFIDENTIAL
INFORMATION

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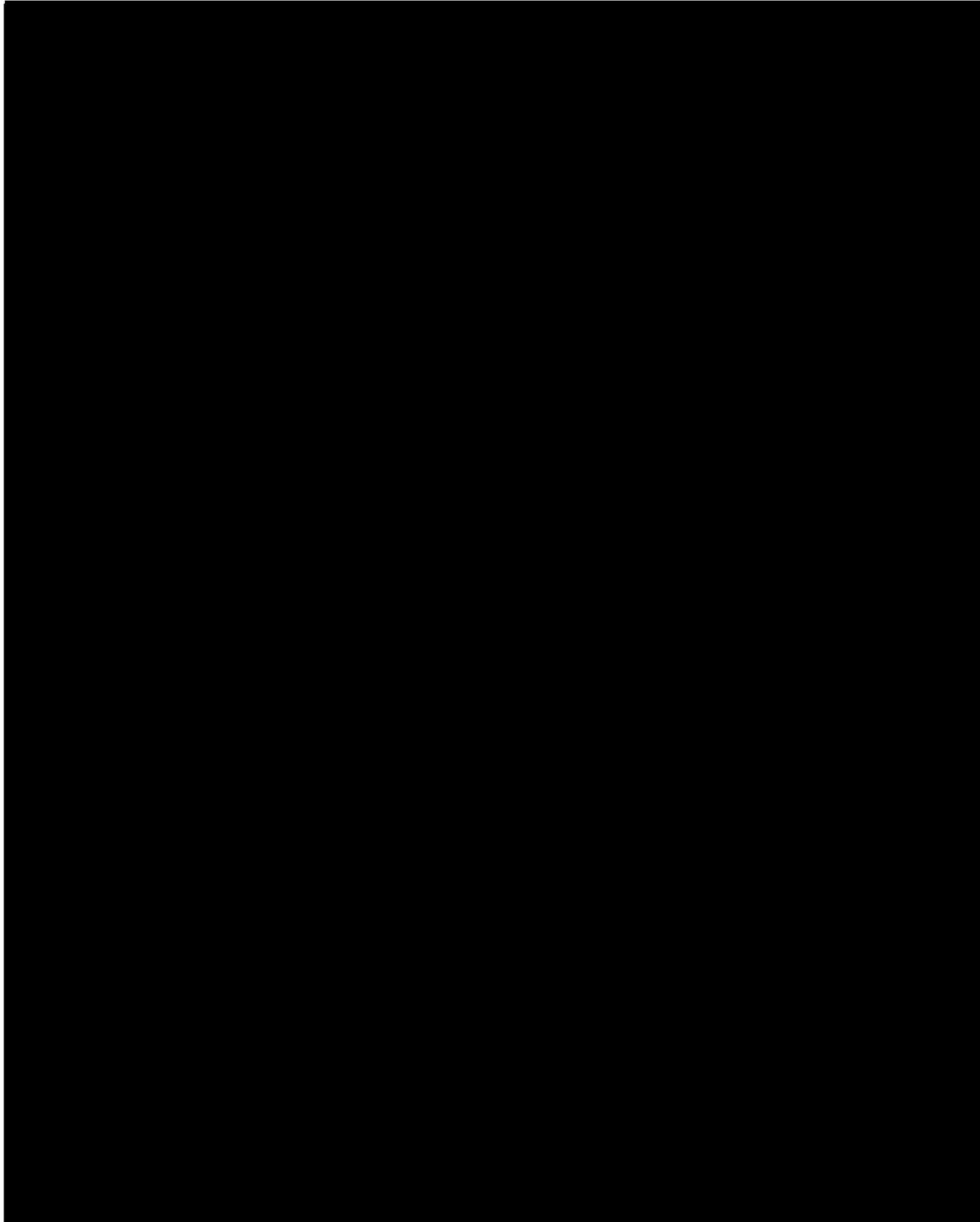
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EXHIBIT 18 - OPPOSITION



24184240.22.BUSINESS

EXHIBIT 18 - OPPOSITION



24184240.22.BUSINESS

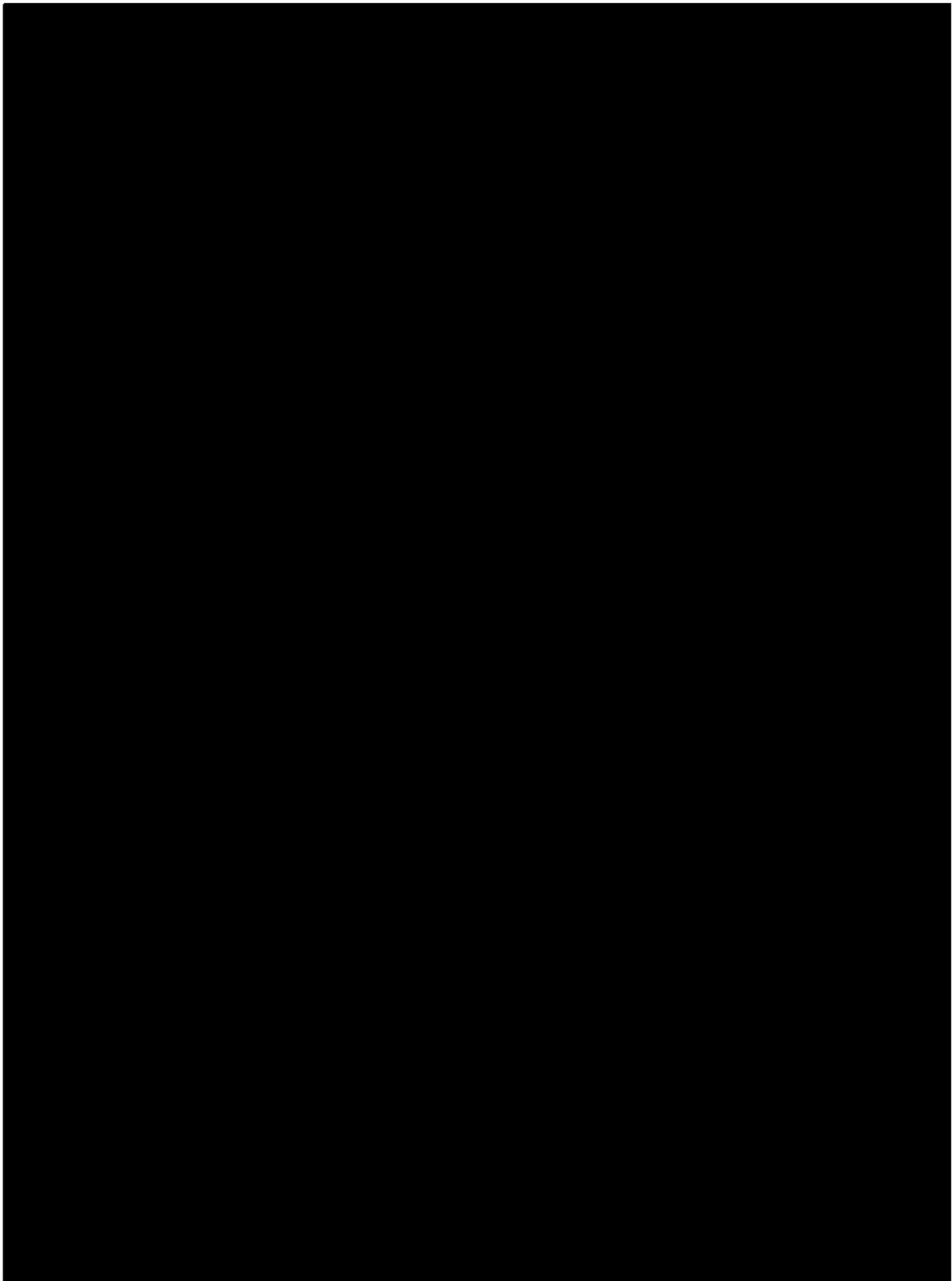
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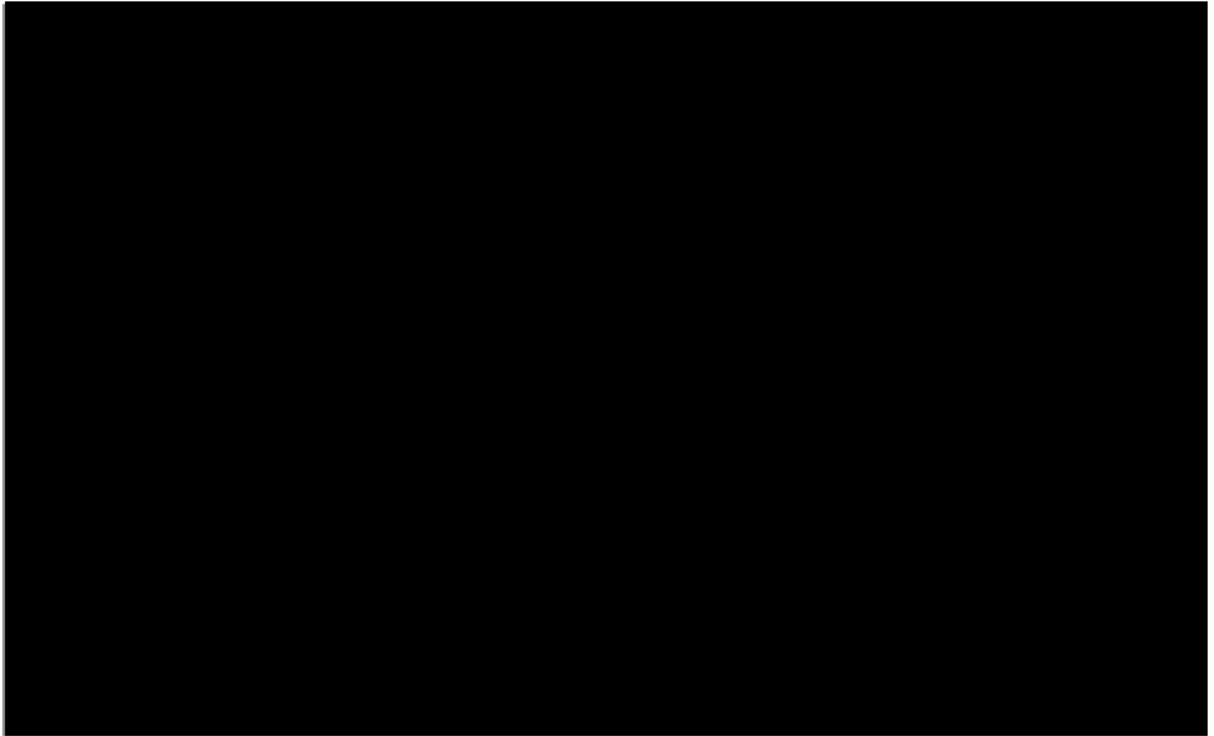
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EXHIBIT 18 - OPPOSITION





24184240.22.BUSINESS

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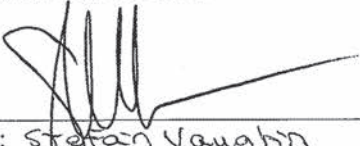
HIGHLY CONFIDENTIAL
INFORMATION

FER_RBX02797984

PTX-204.0105

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

FERRING HOLDING INC.

By: 
Name: Stefan Vaughn
Title: Chief Financial Officer

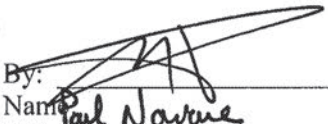
By: _____
Name: _____
Title: _____

[Signature page to Merger Agreement]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

FERRING HOLDING INC.

By: _____
Name: _____
Title: _____

By:  _____
Name: Paul Narine
Title: _____

[Signature page to Merger Agreement]

REBIOTIX MERGER SUB, INC.

By: 

Name: Paul Navarre

Title: President

[Signature page to Merger Agreement]

REBIOTIX INC.


By: 
Name: Lee Jones
Title: Chief Executive Officer

[Signature page to Merger Agreement]

EXHIBIT 18-2 - OPPOSITION

SELLERS' REPRESENTATIVE

Rebiotix Representative, LLC

By: 
Erwin Kelen, its Manager

[Signature page to Merger Agreement]

PROPOSED PRETRIAL ORDER

EXHIBIT 18.2

FERRING/REBIOTIX'S REPLY IN SUPPORT OF MOTION
IN LIMINE NO. 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

FERRING PHARMACEUTICALS INC.,
REBIOTIX INC.

Plaintiffs,

V.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., and FINCH
THERAPEUTICS HOLDINGS, LLC.

Defendants.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., FINCH
THERAPEUTICS HOLDINGS, LLC, and
REGENTS OF THE UNIVERSITY OF
MINNESOTA

Counterclaim-Plaintiffs/Reply Defendants,

V.

FERRING PHARMACEUTICALS INC., and
REBIOTIX, INC.

Counterclaim-Defendants/Reply Plaintiffs.

C.A. No. 21-1694-JLH

FERRING/REBIOTIX'S REPLY IN SUPPORT OF ITS MOTION IN LIMINE NO. 2

Finch's opposition fails to provide any genuine reason to deny Ferring's motion *in limine*. Finch overstates the probative value of the evidence regarding Ms. Jones and Mr. Berman's compensation from the Ferring-Rebiotix merger and understates the prejudicial harm that will inevitably result from introduction of such evidence. These past payments are in no way contingent on this suit, or whether the REBYOTA succeeds in the marketplace. They are not probative of bias.

First, Finch provides no reason as to why evidence of Ms. Jones's and Mr. Berman's roles at Rebiotix at the time of the merger is inadequate to test witness bias. Given the alternative evidence available, exclusion of compensation evidence does not impede Finch's ability to inquire into any potential bias or the jury's ability to assess witness credibility.

Second, Finch contends that "there is nothing unfairly prejudicial about this factual information" (PTO Ex. 18-2-Opp'n at 1), and yet, in one of the cases Finch cites, the court only allowed disclosure of a party's salary and bonus structure "under a protective order, for attorney's eyes only." *Hayes v. Compass Grp. USA, Inc.*, 202 F.R.D. 363, 365 (D. Conn. 2001). Finch concedes that evidence of Ms. Jones and Mr. Berman's personal wealth should be excluded. Yet, Finch claims that evidence of the payment arising from the Ferring-Rebiotix merger can be raised without any implication as to Ms. Jones's and Mr. Berman's personal wealth or financial status. This is impossible. Any evidence regarding the compensation resulting from the merger unavoidably refers to Ms. Jones's and Mr. Berman's financial status and personal wealth. What Finch really wants is to present this evidence to set a benchmark for its damages claim. That, of course, would be improper. If the Court allows any evidence on this issue, it should be limited to the fact that Ms. Jones and Mr. Berman received compensation. It should not include the amount of that compensation.

Dated: July 15, 2024

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/s/ Mary W. Bourke

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*Attorneys for Ferring Pharmaceuticals Inc.
and Rebiotix Inc.*

PROPOSED PRETRIAL ORDER

EXHIBIT 18.4

**FERRING/REBIOTIX'S MOTION *IN LIMINE* TO
EXCLUDE EVIDENCE OF PURPORTED COPYING**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

FERRING PHARMACEUTICALS INC.,
REBIOTIX INC.

Plaintiffs,

V.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., and FINCH
THERAPEUTICS HOLDINGS, LLC.

Defendants.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., FINCH
THERAPEUTICS HOLDINGS, LLC, and
REGENTS OF THE UNIVERSITY OF
MINNESOTA

Counterclaim-Plaintiffs/Reply Defendants,

V.

FERRING PHARMACEUTICALS INC., and
REBIOTIX, INC.

Counterclaim-Defendants/Reply Plaintiffs.

C.A. No. 21-1694-JLH

FILED UNDER SEAL

FERRING/REBIOTIX'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PURPORTED COPYING

I. INTRODUCTION

Ferring Pharmaceuticals Inc. and Rebiotix Inc. (collectively “Ferring”) move to preclude Finch Therapeutics Group, Inc., Finch Therapeutics, Inc, Finch Therapeutics Holdings, LLC, and Regents of the University of Minnesota (collectively “Finch”) from introducing evidence or argument regarding Ferring’s purported “copying” of work done at the University of Minnesota (“UMN”) to support its allegations of induced and willful infringement as well as a secondary consideration of non-obviousness. Finch has indicated that it intends to introduce evidence Lee Jones, one of the founders of Rebiotix, (i) signed a Non-Disclosure Agreement (“NDA”) with UMN; (ii) improperly accessed UMN documents evaluating the protectability and business opportunity for fecal microbiota transplantation (“FMT”) and a confidential version of the provisional application (*e.g.*, Ex. 1; Ex. 2); and (iii) [REDACTED] [REDACTED] (*see, e.g.*, Ex. 3). Such evidence is irrelevant under Federal Rule of Evidence 402 and unfairly prejudicial and misleading under Federal Rule of Evidence 403.

II. ARGUMENT

A. Evidence of Purported Copying Should Be Excluded As Irrelevant

First, Ferring will not argue at trial that the UMN patents are invalid under 35 U.S.C. § 103. Therefore, secondary considerations of obviousness, including any argument that Ferring copied UMN’s work, are not relevant. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18 (1966) (the relevance of secondary considerations is “as indicia of obviousness or nonobviousness”). As a result, Finch should be precluded from offering any evidence, argument, or testimony related to purported copying as a secondary consideration of obviousness.

Second, Finch’s evidence of purported copying is not probative of inducement or willful infringement because all of the alleged copying activity occurred years before any of the asserted claims issued. The ’914 patent was issued on April 9, 2019 and the ’012 patent was issued on

May 14, 2019. Finch's evidence of purported copying reflects events that occurred many years before. The NDA between Lee Jones and UMN was signed in April 2011. Similarly, the UMN documents assessing patentability and business opportunity were provided to Ms. Jones when she was a CEO-in-residence at UMN, a position she held until June 2011. [REDACTED]

[REDACTED]. All of this evidence pre-dates the issuance of the UMN patents by years.

Absent a showing of "particularly egregious behavior" pre-issuance evidence of copying should be excluded. *Sonos, Inc. v. D&M Holdings Inc.*, No. 14-1330-WCB, 2017 WL 5633204, at *4 (D. Del. Nov. 21, 2017). Here, Finch's evidence of purported copying does not rise to the level of "consciously wrongful," "malicious behavior" required in this District for admission of pre-issuance evidence and should be excluded. *Bioverativ Inc. v. CSL Behring LLC*, No. 17-914-RGA, 2020 WL 1332921, at *3-4 (D. Del. Mar. 23, 2020). Indeed, the product Ferring developed (REBYOTA®, an enema) is indisputably different than the product that Finch and UMN tried and failed to develop (CP101, a pill). *Compare Milgo Elec. Corp. v. United Bus. Commc'ns, Inc.*, 623 F.2d 645, 652, 665-66 (10th Cir. 1980) (pre-issuance evidence of copying considered where alleged-infringer reproduced an exact replica of plaintiff's product).

Third, the anticipated evidence of purported copying is not relevant to any other fact at issue. Finch is not asserting any breach of contract claim. Accordingly, whether Ms. Lee Jones entered into an NDA with UMN is irrelevant to the question of infringement. Similarly, whether Ms. Jones received documents describing UMN's evaluation of protectability of its inventions and proposed business plan sheds no light on whether any alleged infringement was induced or intentional. At most, this evidence would show only that Ms. Jones had access to *business* information from UMN, but not that it was used to develop the accused product. Finally, whether

Ms. Jones at one time referred to the work of the UMN inventors in a draft business plan is irrelevant to whether Ferring induced or willfully infringed the *claimed inventions*.

B. Alternatively, Evidence of Purported Copying Should Be Excluded Because It Will Confuse the Issues, Mislead the Jury, and Create Undue Prejudice.

To the extent the Court determines that pre-issuance evidence of copying is relevant, it should still be excluded under Rule 403 as unduly prejudicial and likely to confuse and mislead the jury. Any minimal relevance that these three categories of evidence may have with respect to the parties' claims and defenses is substantially outweighed by its prejudicial effect and propensity to mislead and confuse the jury. If Finch is allowed to argue that Ferring copied the asserted claims, the jury will be led to conflate copying with infringement—allowing Finch to circumvent its burden to show infringement. *Shure Inc. v. ClearOne, Inc.*, No. 19-1343-RGA, 2021 WL 4974001, at *2 (D. Del. Oct. 26, 2021). *See also, Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-CV-3999-BLF, 2015 WL 4129193, at *6 (N.D. Cal. July 8, 2015) (“[T]here is significant prejudice associated with this evidence, as a jury may use evidence of copying to unfairly conclude that Defendant’s products *infringe* the patents-in-suit.”) (emphasis in original). Moreover, Finch has not asserted a breach of contract claim. Thus, allowing Finch to point to the [REDACTED] and introduce evidence and argument implying [REDACTED] carries a high likelihood of confusing the jury as to Finch’s actual claims.

III. CONCLUSION

For the foregoing reasons, Ferring respectfully requests that the Court preclude Finch from presenting evidence or argument regarding purported copying, including that Ms. Lee Jones, (i) signed an NDA with UMN; (ii) received documents evaluating the protectability and business opportunity for FMT and a confidential version of the provisional application; and (iii) referred to the UMN inventors in drafts of a proposed business plan.

Dated: June 27, 2024

WOMBLE BOND DICKINSON (US) LLP

Of Counsel:

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*Attorneys for Ferring Pharmaceuticals Inc.
and Rebiotix Inc.*

PROPOSED PRETRIAL ORDER

EXHIBIT 18-4

Exhibit 1 to Ferring/Rebiotix's Motion in Limine No. 4

Docket No.:	20100243		
Docket Title:	Intestinal Microbial Flora Reconstituent for Treatment of Clostridium difficile associated disease and other Intestinal Maladies.		
Disclosure Date:	6/14/2010	Strategy Manager:	Chad Kieper
		Marketing Manager:	
		Venture Center Lead:	
Inventor:	Alex Khoruts, Mike Sadowsky, Matthew Hamilton		
Department:	Medicine, BioTechnology Institute, Dental School		
Encumbrances:			
Funding:	MMF, Grant-in-aid of Research		
Available Patent Rights:	US <input checked="" type="checkbox"/> Foreign <input checked="" type="checkbox"/>		
Bar Dates:	March 9 th , 2011 – poster presentation		
Industry:	Human Health & Vet Medicine	Pharmaceutical	
Patenting Supports:	Commercially Attractive Sponsored Research University Priorities Public Good		

Technology	
Description of Technology	
Problem Solved / Business Application:	<ul style="list-style-type: none"> Clostridium difficile (C-diff) infections account for ~\$1-4B in medical costs per year in the US. Current treatment options are antibiotics, which are curative in 75% of patients, but a significant number of patients continually relapse. A standard course of antibiotics can cost anywhere from a few hundred to a few thousand dollars, but can creep up to \$20k for patients with reoccurring disease. The primary application of this technology is to treat patients with refractory and/or recurrent Clostridium difficile colitis. Secondary applications include treating patients with dysbiotic intestinal microflora that may be induced by antibiotic treatments or underlying gastrointestinal disease.
Description: (From market perspective, describe the product or process enabled by the discovery)	<ul style="list-style-type: none"> Standardized method and formulation of intestinal microbiota derived from human fecal material for Treatment of C. Difficile Associated Disease and other microbiologically-mediated intestinal disorders.

<p>Advantages:</p> <p>(Examples: cheaper; faster; better; new; green, etc)</p>	<ul style="list-style-type: none"> • Fecal bacteriotherapy, also known as fecal transplantation and fecal transfer, is performed by administration of fresh, homogenized fecal material directly from the donor feces into a patient by way of nasogastric tube administration, enema, or colonoscopy. The goal of our proposal is to develop a standardized formulation of fecal bacteria preserved and possibly grown outside the human donor. Existing technologies also include a number of so-called probiotics, which are based on monocultures or consortia of microorganisms. Our method is different in that it aims to maintain a greater degree of complexity of microbiota that is closer to the composition of human intestinal microbiota. Also, our preparation is based entirely on natural intestinal microorganisms, which are adapted to the intestinal environment, and are present in feces of healthy humans. This contrasts with the majority of current probiotic formulations that contain organisms that aren't necessarily adapted to the human intestine and are not able to compete well with native microflora. • Fecal bacteriotherapy today is impractical because of time constraints and aesthetic limitations involved in the procedure. In addition, the procedure requires screening for donors for a variety of diseases, which adds to the cost of the procedure and imposes additional time delays. Use of different donors for each patient makes it difficult to estimate potential risks of the procedure, and to compare effectiveness of the treatment, and microflora reconstitution between patients. None of the current probiotics that use microorganisms cultured outside the human colon have been shown to have significant therapeutic efficacy. Availability of a standardized formulation of fecal microbiota should solve all of these problems. Such a product would be easy to administer, whether done rectally or orally, easily available to any practitioners, and minimize time delays associated with donor screenings. Of course, this product will also be therapeutically highly effective in contrast current probiotics.
Related Technologies:	
Technology Position:	<input type="checkbox"/> Alternative <input checked="" type="checkbox"/> Incremental <input type="checkbox"/> Leapfrog

Stage of Development:	<ul style="list-style-type: none"> We have an active clinical program for doing fecal bacteriotherapy. We are the first laboratory to demonstrate that this procedure does lead to colonization of patients with the donor bacteria. We are now beginning to use frozen fecal material for the procedure instead of fresh fecal material. The next steps will include lyophilizing the preparation and growing the fecal bacterial poly-cultures in an anaerobic bioreactor. We will also physically fractionate bacteria present in fecal material to discern the "active microbial fraction" that is involved in the reconstitution of intestinal microbiota resulting in a cure of disease symptoms. The ultimate goal is to create an enteric-release capsule or standard enema preparation.
Comments:	

Action					
Stage 1		Stage 2		Stage 3	
IP Action	Date	IP Action	Date	IP Action	Date
<input type="checkbox"/> Close		<input type="checkbox"/> Close		<input type="checkbox"/> Close	
<input type="checkbox"/> Watch & Hold		<input type="checkbox"/> Watch & Hold		<input type="checkbox"/> File	
<input checked="" type="checkbox"/> Continue	6/23/2010	<input checked="" type="checkbox"/> File Provisional	3/2/2011		
<input type="checkbox"/> Other:		<input type="checkbox"/> Continue			
		<input type="checkbox"/> Copyright			
Recommendation/Rationale:		Recommendation/Rationale: <ul style="list-style-type: none"> \$2k to file a provisional with David Provence. Potentially weak patent claims, but this technology possesses a clearly defined initial market, regulatory path, and clinical roadmap. 		Recommendation/Rationale:	
Marketing Status:		<input type="checkbox"/> Market		<input type="checkbox"/> Market	
		Brief Description of Activity:		Brief Description of Activity:	

Primary Assessment	
Commercialization Potential	
<ul style="list-style-type: none"> Product description Customer end user ID Potential market size, growth rate, dynamics Fields of Use Market size by field Unmet market need Market contacts perceived value (EOC; VOC) Competing technologies Alternatives Prospective licensee or start-up identified or expressed interest NDA 	Green

executed	
• Predisposition of industry to licensing or to funding start-ups	
• Development status – short time to milestones	
• Innovation Grant – What milestones could be achieved with grant?	
• Regulatory status	
<ul style="list-style-type: none"> • <u>Clostridium difficile “C-diff” overview:</u> <ol style="list-style-type: none"> 1. Responsible for 15-20% of all antibiotic-related diarrhea cases (~3-4 million cases annually in the US) 2. Mortality rates have doubled from 2000 to 2005. 3. The incidence of C. difficile diarrhea has risen dramatically in recent decades – growing at a rate of ~20% per year since 2000. 4. Accounts for considerable increases in the length of hospital stays and more than \$1.1B in healthcare costs (2005 numbers – current estimates are around \$3-4B/year). 5. In the hospital setting, C-diff patients had the following outcomes versus controls: <ul style="list-style-type: none"> ▪ Total hospital costs: \$24k vs. \$9k ▪ Medication costs: \$4k vs. \$0.9k ▪ Length of stay: 21.8 vs. 7 days ▪ Mortality rates: 13.9% vs. 3.6% 6. Twenty-five percent of patients will have a relapsing C-diff infection, and up to 5% of patients have 6 or more relapses. 7. Approximately 3% of patients develop severe C-diff infections, and the mortality rate in these patients is 30-85%. 8. <u>Treatment options:</u> <ul style="list-style-type: none"> ▪ <u>Metronidazole</u> (500mg) orally 3-4 times a day for ~2 weeks. Response rates are ~90%. Cost = ~\$200-300 for a 14 day course. ▪ <u>Vancomycin</u> (125-500mg) orally 4 times a day for ~2 weeks. Response rates are ~90%. Cost = ~\$1700-2000 for a 14 day course. ▪ Patients with perpetual recurrence will generally be kept on a single dose of Vancomycin every day. According to Dr. Khoruts (a practicing gastroenterologist) the current cost of a single dose of Vancomycin is \$60/day. This would result in a burden of over \$20k/year in drug costs. • Problem solved: C-diff infections currently impact the healthcare industry with billions of excess dollars in hospital/clinic and treatment costs. Standard treatment protocols (antibiotics) are beneficial, but recurrence occurs in 25% of the patients. • Current fecal transfer procedures require the bulk transfer of donor material to the recipient via an enema, or delivery by endoscope. These procedures are unwieldy to perform and the “ick” factor keeps many procedures from being performed, despite good clinical evidence of its efficacy. • <u>Regulation</u> – <ol style="list-style-type: none"> 1. According to Dr. Khoruts, he envisions this being regulated by the FDA similar to blood derived products. This would involve a rigorous selection of donors and screening for pathogenic organisms. The key is to have a standard process in place. 2. There is currently a National Consortium of Gastroenterologists working to create a standardized method for fecal transfer. The protocol they are using is based upon the “old” bulk transfer method. What our inventors are working on would be an innovative step forward from the current methods. • C-diff is the first indication, but published research indicates that other GI diseases might benefit from this therapy – such as Crohn’s, Ulcerative Colitis, obesity, etc. • <u>Market Potential</u> <ol style="list-style-type: none"> 1. The inventors claim the costs of producing their product is minimal and requires basic laboratory equipment. Production cost per dose should be less than \$100. 2. All C-diff patients (4M/year in the US), C-diff relapse patients (1M/year in the US). <p><u>References</u> – Am. Family Physician 71:921(2005); Interscience Conf. on antimicrobial agents and chemotherapy 43:abstract K734(2003); Emerging Inf Diseases 14:929(2008).</p>	

Protectability	
<ul style="list-style-type: none">Potential claim coverage and scopePatentability obstaclesPatent activity in the fieldActivity (practice of invention) obstaclesPotential for/ease of design aroundAbility to detect infringement enforceability	Yellow
<ul style="list-style-type: none">"Fecal transfer" to treat C-diff and a cadre of other gastrointestinal diseases has been demonstrated in the literature for decades. Several of institutions are currently employing this method using a low-tech bulk transfer technique.However, no one has taken the steps to systematically develop a process by which to create a "clean" product devoid of fecal matter. Our researchers have created a protocol by which the donor material is "cleaned", "purified" and modified for long term storage. Their ultimate goal is to create a freeze-dried product that can be delivered via an enteric-release capsule.According to David Provence (attorney at Mueting, Raasch, and Gebhardt) there is potential novelty in the following:<ul style="list-style-type: none">Donor selection protocolProcessing protocolFreezing processComposition – the molecular "fingerprint" of the donor microbiotaHowever, there are numerous papers in the literature that demonstrate the effectiveness of fecal transfer to treat a number of diseases (such as IBD). This may create some obviousness hurdles.	
Note: Evaluation and commentary described herein are preliminary and non-binding, and may not express formal legal analysis and conclusions by licensed practitioners.	
Inventor	
<ul style="list-style-type: none">Experience with OTCIndustry Relationships Ability to facilitate licensing processThought Leader recognized in industry championCited reference searchFunding – Well funded for continued research	Green
<ul style="list-style-type: none">Dr. Alex Khoruts is a practicing Gastroenterologist and research scientist within the University of Minnesota.Dr. Mike Sadowsky is an expert in the identification of bacteria within the Department of Microbiology.	
Technical Merit	
<ul style="list-style-type: none">Availability of data supporting novelty, utility, non-obviousnessResearch area – competitiveness, industry interest, 'hot' areaCore platform Stand alone technologyClinical data or prototypeDevelopment or scale up neededWould project benefit from Innovation Grant?OTC experience with other similar technologiesLarger portfolio, if yes, then list	Green
<ul style="list-style-type: none">The inventors have treated 29 patients that have experienced recurrent C-diff infections (at least 3 relapses per patient):<ul style="list-style-type: none">27 patients have had a complete response (no diarrhea and a lack of detectable C-diff in their stool).2 patients are currently under-going re-treatment due to relapse.	

- The inventors have developed a clean-up and “freezing” protocol that allows them to bank the purified microbiota for later use.
- They are currently working on a freeze-dried prep that can be used in an enteric capsule formulation.
- Our inventors have also utilized molecular techniques to define the microbiota “fingerprint” in the donor and recipients. This will hopefully lead to the identification of the sub-groups of bacteria responsible for the beneficial effect of the fecal transfer.
- Our inventors have a network of Gastroenterology clinics who are interested in testing their new preparation for clinical trial purposes.
- IRB approval is already in place.

Secondary Assessment	
Business/Opportunity Summary (Overall)	
<ul style="list-style-type: none"> What is the problem/opportunity? What is the market size? (validate through both primary/secondary sources) What is the solution and the solution's benefits/features/unique attributes? What is the value of the solution (based on industry/competition)? What are the barriers to entry? Who are the competitors and what is the solution's competitive advantage? What needs to happen in order to make it to the market? What are the weaknesses? What are the assumptions? 	[ENTER COLOR RANKING]
Marketing Strategy (License)	
<ul style="list-style-type: none"> What is the product/service? Define the asset. Define the value proposition in quantitative terms (\$). Define the value chain. How will you promote/sell the product/service? How will you structure the license deal? FOU? Exclusive? Non-exclusive? How will you position your product/service? In what markets and segments? Target companies, qualified prospects, industry contacts, etc. Is business development required? <ul style="list-style-type: none"> assessment of marketing opportunities and target markets intelligence gathering on customers needs, product requirements, etc generating leads for possible sales What are the assumptions? 	[ENTER COLOR RANKING]

Marketing Strategy (Venture)	
<ul style="list-style-type: none"> What is the product/service? Define the asset. How will you promote/sell the product/service? Define the value proposition in quantitative terms (\$). Define the value chain. How will you distribute the product/service? How will you position your product/service? In what markets and segments? What are the assumptions? 	[ENTER COLOR RANKING]
Financial Strategy (License)	
<ul style="list-style-type: none"> What funds are needed to achieve each milestone and how will they be spent (budget)? What are the financial projections (use excel template)? How will the University make money? Pricing strategy? Would an innovation grant increase the value? What are the assumptions? 	[ENTER COLOR RANKING]
Financial Strategy (Venture)	
<ul style="list-style-type: none"> What funds are needed to achieve each milestone and how will they be spent (budget)? What are the financial projections (use excel template)? How will the University make money? Pricing strategy? Would an innovation grant increase the value? What is the exit strategy? What are the assumptions? 	[ENTER COLOR RANKING]

Management Team (Venture)	
• Who is the CEO and management team?	[ENTER COLOR RANKING]
• What do they know? Whom do they know? How well are they known?	
• Are they financeable?	
• What diligence has the University done?	
• What additional management is needed?	
• What are the team's strengths and weaknesses?	

PROPOSED PRETRIAL ORDER

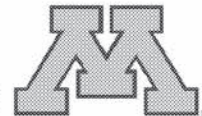
EXHIBIT 18-4

Exhibit 2 to Ferring/Rebiotix's Motion in Limine No. 4

Intestinal Microbial Flora for Treatment of *Clostridium* *difficile* (C. diff)

**Alison DellAngelo, Avantika Chaudhary,
Dan Gilberston, David Sly, Scott Wood**

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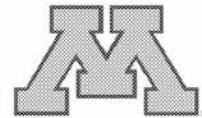


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Inventors

- Alex Khoruts, M.D.
- Mike Sadowsky
- Matthew Hamilton

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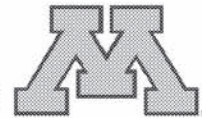


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Agenda

- Innovation Overview/Technical Evaluation
- Evaluation Summary
- Intellectual Property
- Regulatory Hurdles
- Market Size/Potential
- Competitive Landscape
- Reimbursement
- User Evaluation
- Financials
- Strategic Positioning
- Conclusion

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Phil

Disease Evaluation – *Clostridium Difficile*

*C.
difficile*

Bacteria that causes intestinal problems (diarrhea, colitis)

Thrives when gut homeostasis is disrupted due to antibiotic treatment

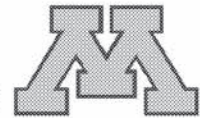
Commonly acquired in hospitals

Spores are able to survive outside of body for extended period of time

Resistant to many common cleaning methods (ie hand sanitizer)



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Alison

Treatment Evaluation – *C. Difficile*

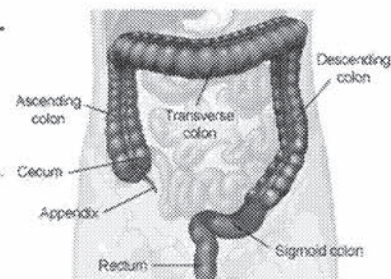
Current
Treatment

Most common treatment is
antibiotics

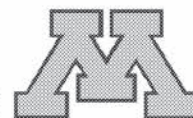
Recurrence is seen in about
20% of infections

Antibiotic usage may continue
disruption in gut flora

Surgery may become
necessary



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Technical Evaluation – Fecal Transfer

Fecal Bacteriotherapy

- Used since 1950's
- Not commonly used – ick factor?
- Limited clinical trials show very successful results

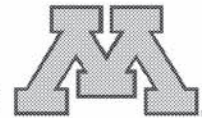
Fecal Transplant

- Feces from healthy donor is processed and transplanted
- Multiple insertion methods

Return to homeostasis

- Microbes in transplanted feces replace those lost due to antibiotic treatments
- *C. diff* is eliminated, patient returns to health

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Technical Evaluation – OTC Innovation

Fecal Transfer is suitable treatment for *C diff*

- Final formula is 99.9% living material
- Contains 4 different phyla of bacteria
- Contains 10 different classes of bacteria

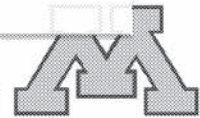
Donor Screening Method

- Standardized method for checking health of patient
- Diseases and ailments checked to prevent infections through transplant

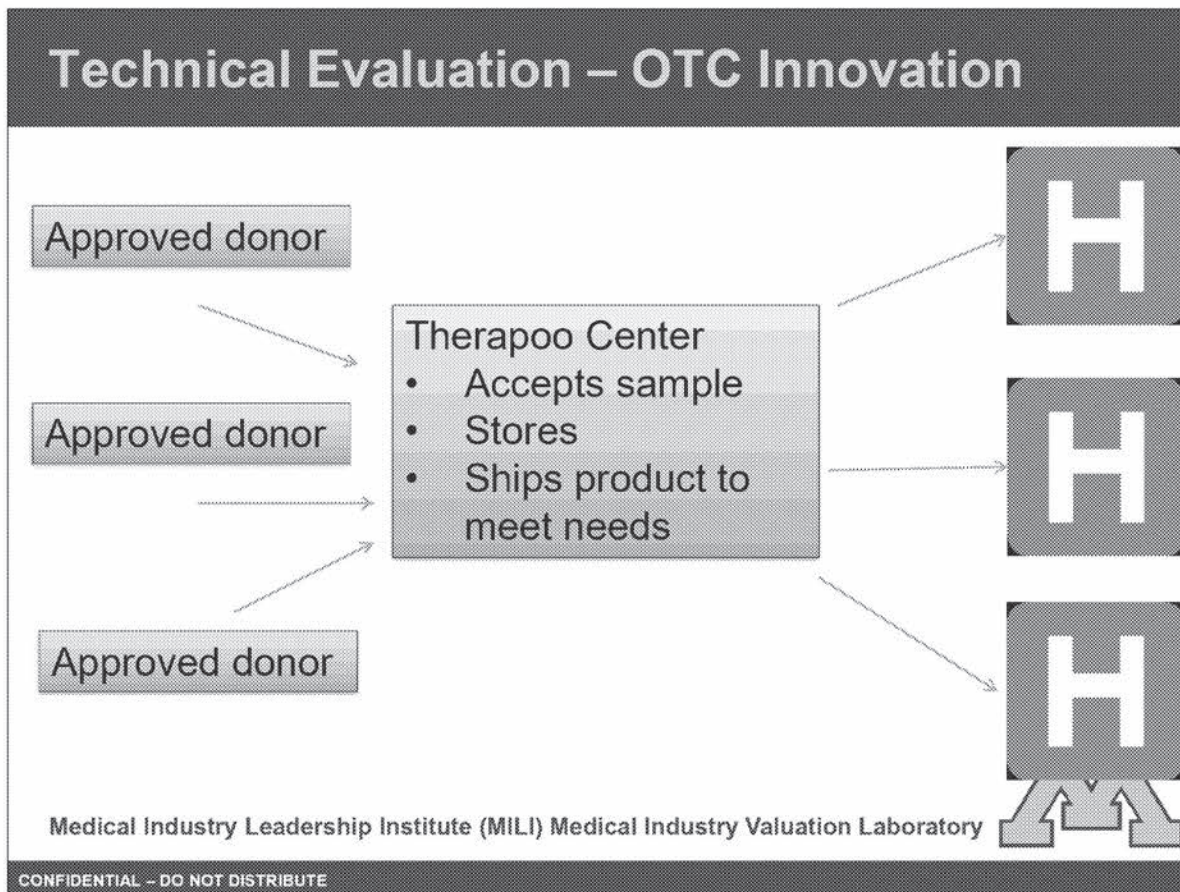
Process of Sampling

- Method for processing and storing samples
- Blended, filtered and frozen

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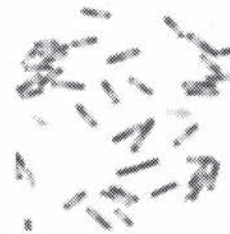
Evaluation Summary

Business
Case

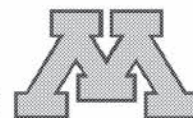
IP protection is questionable due
to prior art and obviousness
-Develop IP with research?

Regulatory pathway is
uncharted, therefore it will likely
be long and costly

Reimbursement is not available,
however hospitals should be
interested



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Intellectual Property

IP

Provisional Patent filed on 3/2/11

File # 110.03400160

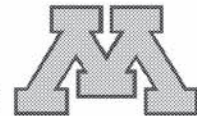
"Compositions and Methods for
Transplantation of Intestinal Microbiota"

Claim is around a composition comprising of
several families of bacteria

Differentiation lies in "composition comprises
of no greater than 0.1% non-living fecal
materials"



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Intellectual Property – Potential Novelty of IP

Novelty Hire a patent attorney

Bacterial therapy for treatment of C-diff using
a “clean” product devoid of fecal matter

Donor material cleaned, purified and modified
for long-term storage

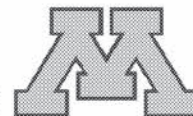
Goal is to create a freeze-dried product that
can be delivered via enteric-release capsule

Donor selection protocol

Bacterial composition and processing



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Intellectual Property - Concerns

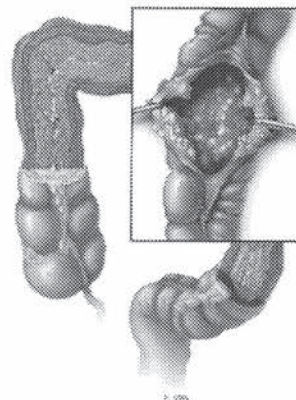
Concerns Are the claims novel, or are they an obvious leap from the existing research?

The basis of the "composition" is derived from mixing, straining and filtering human fecal matter

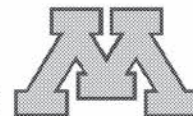
Methods used to create composition have been widely published

Is 99.9% necessary? Can 99% be used to mimic?

Can another firm simply use different phyla and classes of bacteria?



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Scott

Intellectual Property - Prior Art?

The Inventors Method

- "A composition may be prepared by obtaining a fecal sample from an appropriate donor and blending with a diluent."
- "Removal of non-living fecal material may be achieved by passing blended material through a sieve..." (Provisional Patent #110.034.00160 "Compositions and Methods for Transplantation of Intestinal Microbiota")

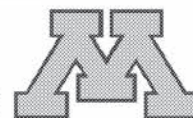
Published Methods

- Dr. Louie, University of Calgary, conducted 59 fecal transfers over an 11-year period.
- The stools were mixed w/ saline and sieved through a wire mesh to remove particulates.
(<http://www.internalmedicine.com/news/gastroenterology/single-article/fecal-transfer-cures-relapsing-ic-diffi-infection/7c3ce0b64f.html>)

Homespun Method

- Guide to homespun fecal transplant described in the *Clinical Gastroenterology and Hepatology* journal
- "entirely safe to do the procedure this way, provided that a doctor gets involved at some point to screen the donor sample" (<http://www.slate.com/id/2282768/>)

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Mike Silverman, a University of Toronto physician who wrote up a guide to homespun fecal transplants for the journal *Clinical Gastroenterology and Hepatology*, says it's entirely safe to do the procedure this way, provided that a doctor gets involved at some point to screen the donor sample.

Regulatory Hurdles

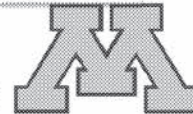
FDA confirmed that this type of product would be regulated as a biologic

- Fecal matter has the potential to cause infections and would therefore be regulated by the FDA
- FDA treats fecal matter as a biologic since they view it as a tissue
- Clinical trials would be required for FDA approval

Nutraceutical route is not an option

Many companies have already approached the FDA regarding similar products.

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Dave

Regulatory Hurdles

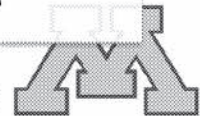
Clinical trials would be expensive

- Clinical trial costs are very expensive (\$20M-\$50M)
- Average length of time is 9 years (pharmaceutical)
- Less than 10% of applications receive approval (pharmaceutical)

C diff Fecal Transfer is uncharted territory for FDA regulation

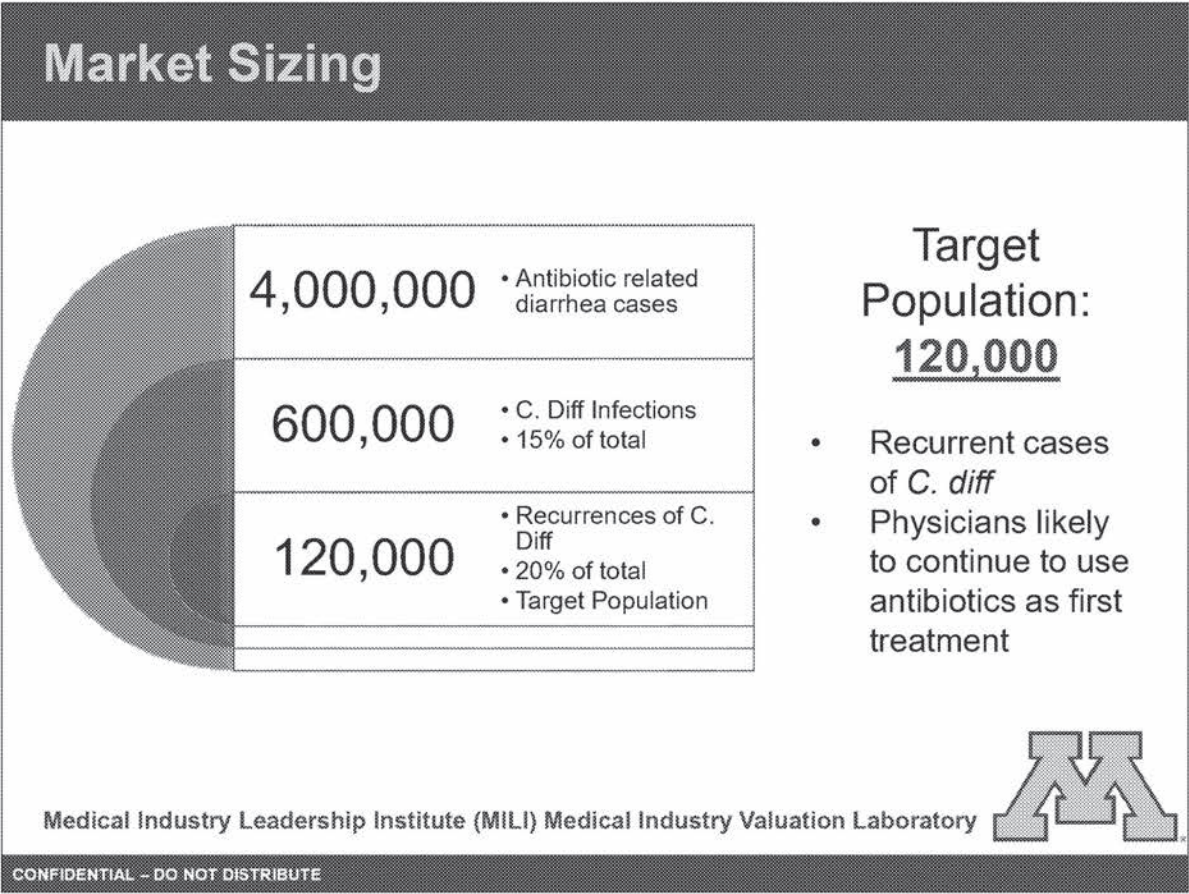
- Clinical trials would be subject to scrutiny from the FDA
- Barriers to entry would be lowered for followers

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<http://www.aei.org/outlook/100068>

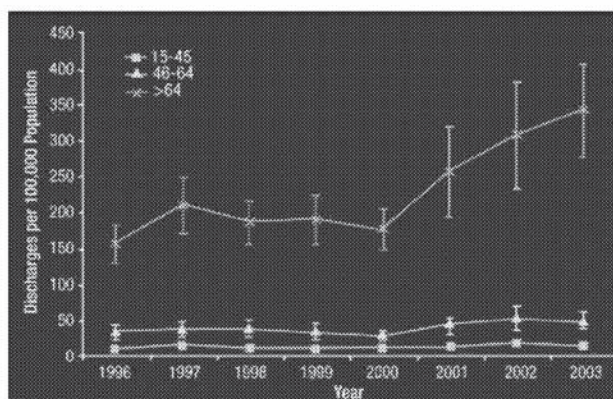


Avantika

Market Size – Rising Incidence

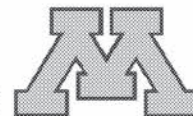
- 2/3 of patients are elderly¹
- 23% annual increase in hospital discharges²
- Patients considerably sicker/more complex cases¹
- *C. diff* is becoming more common and costlier to treat!

Hospital Discharge Rates with *C. difficile* by age



Graph: McDonal LC, et al. Emerg Infect Dis. 2006; 12(3): 409-15
Blossom, D.B., Clinical Infectious Disease. 2007; 45: 222-227

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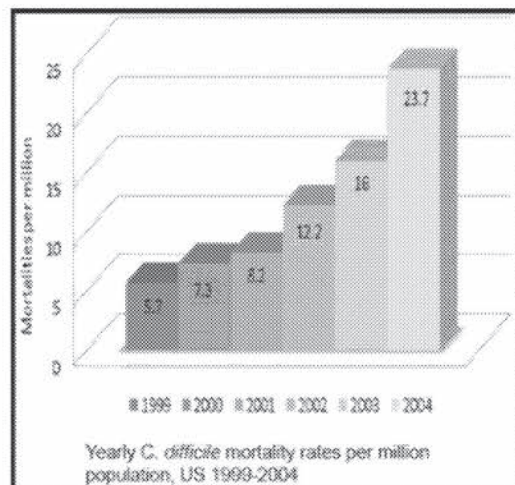
Graph: McDonal LC, et al. Emerg Infect Dis. 2006; 12(3): 409-15
Blossom, D.B., Clinical Infectious Disease. 2007; 45: 222-227

1. Elixhauser, Anne and Jhung, Michael. Clostridium Difficile-Associated Disease in US Hospitals, 1993-2005. Healthcare Cost and Utilization Project. Agency for Healthcare Research and Quality. Statistical Brief #50. April 2008.

2. Zilberberg, Marya D et al. Increase in Adult Clostridium difficile-related hospitalizations and case-fatality rate, United States, 200-2005. Emerging Infections Diseases. Vol 14, No. 6, June 2008. www.cdc.gov/eid.

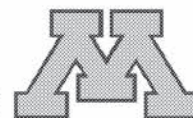
Market Sizing - Mortality

- Mortality rate - 6.9%
- After 1 year – 16.7%¹
- Mortality after 4 recurrences- 30-85%
- 25% in frail elderly patients²
- Quadrupled from 1999 to 2004
 - 5.7 to 23.7 per million



Dallal RM, et al. *Ann Surg.* 2002; 235:363-372
 Muto C, et al. *Infect Control HospEpid.* 2005
 Pepin J, et al. *CMAJ*, 2005

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Aberra, Fatten N. Clostridium Difficile Colitis. Medscape Reference. <http://emedicine.medscape.com/article/186458-overview#a0199>

Tipton, Lyn. Clostridium difficile prevention strategies. <https://www.bcbsal.org/providers/ahqi/2011CDiffSlides.pdf>

Competitive Landscape - Current

Metronidazole

- Antibiotic – often first choice treatment
- ~\$250/treatment
- Marketed by Pfizer, Sanofi Aventis

Vancomycin

- More often used in recurrences
- ~\$1,850/treatment
- Antibiotics losing effectiveness – resistant strains

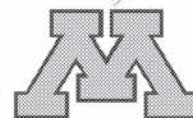
Combinations

- Pulse treatments, extended timelines
- Eventually move to daily treatment
- Up to \$20,000

Surgery

- Last resort
- Colectomy (removal of part of colon)
- Ileostomy (route small intestine to skin)

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Competitive Landscape - Future

Difficid

- Astellas Pharma/Optimer Pharma
- FDA Approval – April 5th, 2011
- Specifically noted for C. Diff infections



Developing Treatments

- 28 in development
- Major companies and start ups
- Antibacterial, Antidiarrheal, IV, Vaccines

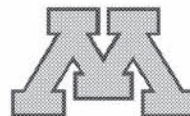


Fecal Transfer

- In-house by doctors
- FDA approval not required



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Reimbursement

Since 2008, Medicare does not reimburse for hospital acquired *C. diff* infections

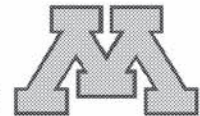
- Hospital is at fault for infection
- Hospital is liable for associated costs

This represents a significant value proposition for OTC

- Expected cost for treating recurrence is ~\$13,000
- Worst case scenario costs ~\$220,000
- Can be troublesome for hospitals to clear/sanitize gastro suites to do fecal transplant

*** *C. diff* primary infections are coded as ICD 9-CM 008.45 ***

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User Evaluation – VOC

Feedback
from Hospital
Pharmacists

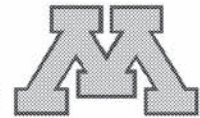
C Diff is a problem and they do see recurrences. Standard treatment is antibiotics.



Some doctors have discussed fecal transfer, but logistics are a concern

Have heard of research being done to make a more feasible process

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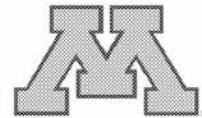


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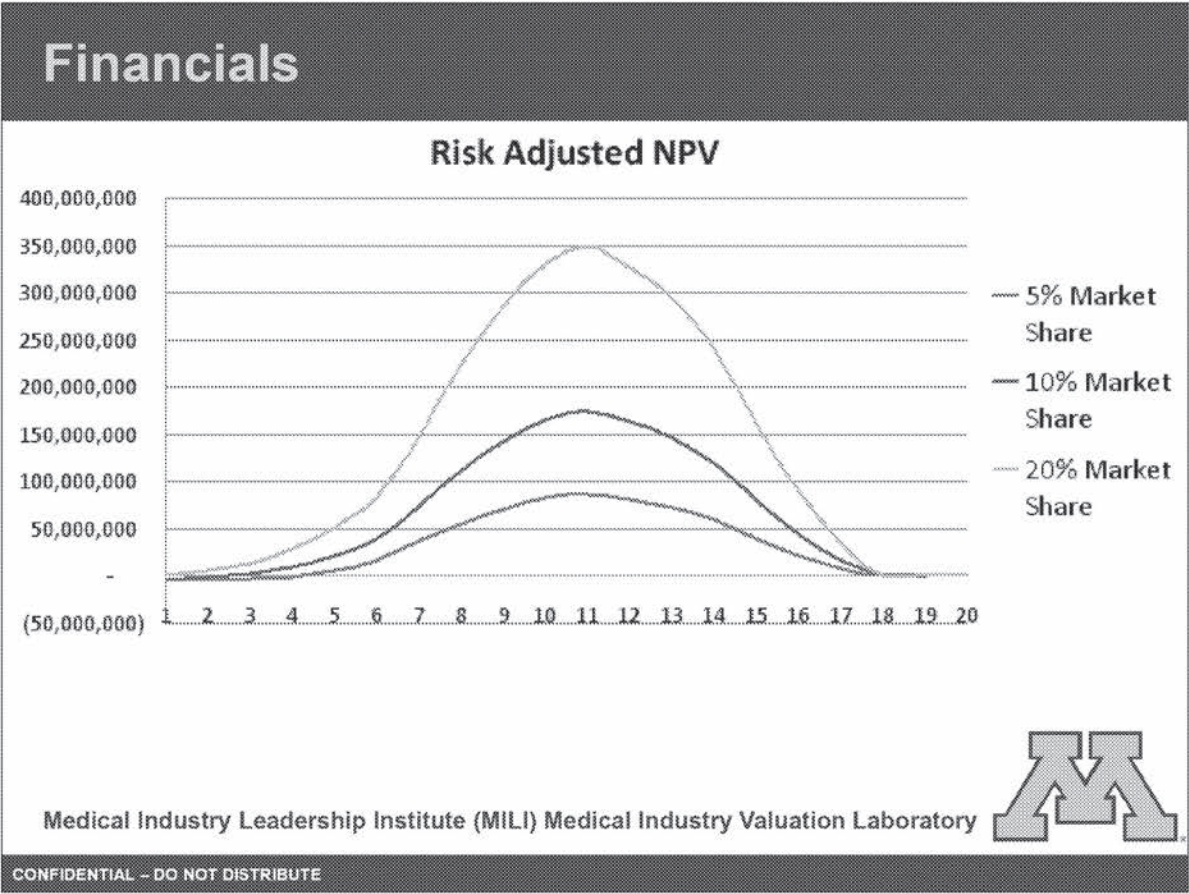
Financial Assumptions

Market Size	120,000
Per Unit Revenue	\$8,000
Operating Margin as a percentage of Revenue	35%
Market Penetration Scenarios	5%, 10%, 20%
Clinical Trial Cost	\$37.5 million
Discount Rate	50%

Medical Industry Leadership Institute (MILI) Medical Industry Valuation Laboratory



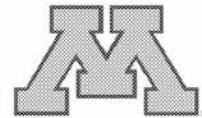
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Financials

Market Penetration Scenario	Risk Adjusted NPV
5%	-\$4,481,619
10%	-\$2,527,920
20%	\$1,379,478

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Strategic Positioning- SWOT

Strengths

- Treatment is effective
- Raw material is readily available
- Inexpensive production of final composition

Weaknesses

- IP for sample preparation could be difficult to defend
- Uncharted regulatory pathway – will be expensive and difficult as first movers
- Feasibility of animal testing to prove efficacy unclear
- Cultural acceptance of treatment method

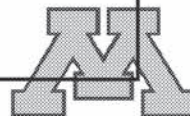
Opportunities

- Rising incidence rates of C. diff – increasing market
- Current treatment methods becoming less effective – C. diff strains becoming resistant
- Potential cost savings for hospitals - C. diff infections not reimbursed

Threats

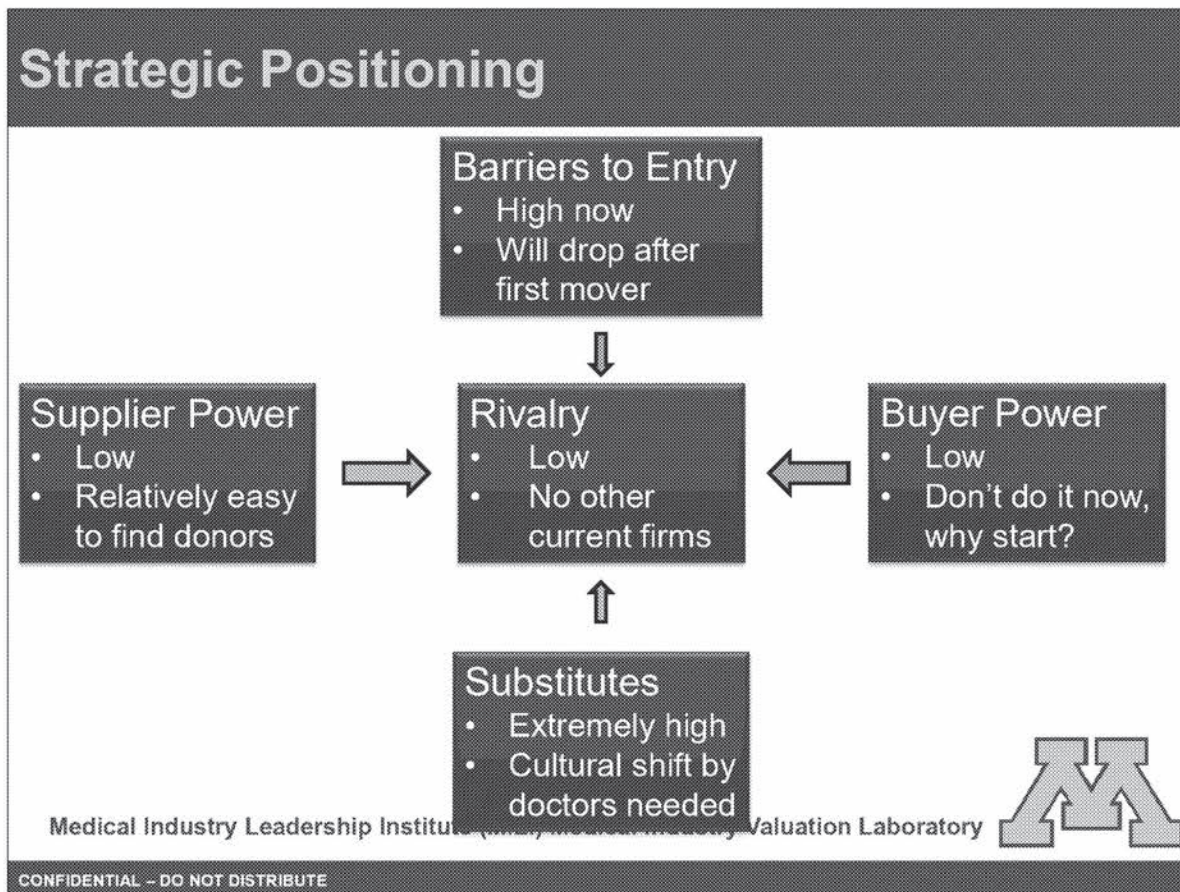
- Easily replicated preparation and treatment process
- Overcoming current treatments
- Difficid and other treatments in development
- In-hospital fecal transfers

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Dan



Dan

Rivalry - Currently there are not other companies in the space of using fecal transfer for C. diff treatment

Substitutes - Many pharma companies with treatments and pursuing other trials currently, surgery options

Buyer power - Currently hospitals have to treat this, but buyer power could get higher if treatment is priced too high and hospitals could pursue this processing on their own

Supplier power - nonexistent, likely will be done for low pay or as donation

Barriers - Currently high because regulatory path is not paved, but followers could be fast once regulatory process established

Conclusions

Recommendation

As a private investor – wait and see

As an inventor, firm up IP and regulatory path

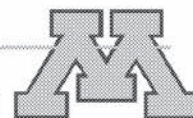
Hire a patent lawyer to determine IP

Consider partnering with a hospital system as this is market that is going to benefit from this process

Investigate and define a clinical trial strategy

If human path has too many hurdles consider livestock industry as a potential market

Medical Industry Leadership Institute (MILI) Medical Industry Valuation Laboratory

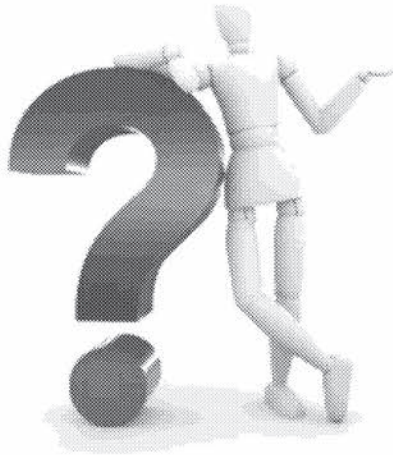


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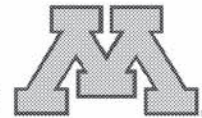
Alison

Thank You

Questions?



Medical Industry Leadership Institute (MILI) Medical Industry Valuation Laboratory



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PROPOSED PRETRIAL ORDER

EXHIBIT 18-4

Exhibit 3 to Ferring/Rebiotix's Motion in Limine No. 4

Message

From: Lee Jones [Leeajones@aol.com]
Sent: 8/5/2011 7:12:50 AM
To: courtney.jones9@gmail.com
CC: leeajones@aol.com
Subject: transbiome bp
Attachments: Transbiome bplan 8111.docx; Symbiome_business_plan_contest721lj.docx

Courtney, I have attached a copy of the Transbiome business plan and the Symbiome business plan. I have changed the executive summary in the TBI plan and need two things: a table of contents and the references redone. I took out the first illustration and deleted that reference so the others need to be looked at. I put in some numbers where the references used to be. Hope that helps.

Mom

PROPOSED PRETRIAL ORDER

EXHIBIT 18.4

**UMN/FINCH'S OPPOSITION TO FERRING/REBIOTIX'S
MOTION IN LIMINE NO. 4 TO EXCLUDE EVIDENCE OF
FERRING/REBIOTIX'S COPYING**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

<hr/>)	
FERRING PHARMACEUTICALS INC.,)	
REBIOTIX INC.)	
)	
Plaintiffs,)	
)	
v.)	
)	
FINCH THERAPEUTICS GROUP, INC.,)	
FINCH THERAPEUTICS, INC., and FINCH)	
THERAPEUTICS HOLDINGS, LLC.)	C.A. No. 21-1694-JLH
)	
Defendants.)	FILED UNDER SEAL
<hr/>)	
)	
FINCH THERAPEUTICS GROUP, INC.,)	
FINCH THERAPEUTICS, INC., FINCH)	
THERAPEUTICS HOLDINGS, LLC, and)	
REGENTS OF THE UNIVERSITY OF)	
MINNESOTA)	
)	
Counterclaim-Plaintiffs/Reply Defendants,)	
)	
v.)	
)	
FERRING PHARMACEUTICALS INC., and)	
REBIOTIX, INC.)	
)	
Counterclaim-Defendants/Reply Plaintiffs.)	
<hr/>)	

**UMN/FINCH’S OPPOSITION TO FERRING/REBIOTIX’S MOTION
IN LIMINE NO. 4 TO EXCLUDE EVIDENCE OF FERRING/REBIOTIX’S COPYING**

Ferring's latest attempt to exclude critical evidence of its own copying of the patented technologies should be denied because Ferring's copying is relevant to numerous issues in the case, including Ferring's willfulness, inducement of infringement, and critical damages issues. Contrary to Ferring's assertion, the relevance of this evidence far outweighs any purported prejudice or potential for juror confusion, and Finch would be greatly prejudiced in proving its case if Ferring's request were granted. Ferring's MIL #4 should be denied.

Evidence of copying is relevant to willfulness and inducement.¹ *Purewick Corp. v. Sage Prods., LLC*, 666 F. Supp. 3d 419, 441 (D. Del. 2023) ("copying may [] be relevant evidence to support a theory of willfulness") (internal quotation omitted); *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 96 F.3d 1409, 1414 (Fed. Cir. 1996); *Motio, Inc. v. BSP Software LLC*, 2016 WL 4430452, at *5 (E.D. Tex. Aug. 22, 2016) ("jury could consider the evidence, including allegations of [] copying . . . as relevant in determining whether or not Defendants possessed the intent to cause infringement"). It is also relevant to damages, particularly to rebut Ferring's assertions that the patented inventions are worthless, and is relevant to *Georgia Pacific's* factor 11 (extent of use of UMN's invention). Ex. A at 13–15, 17, 78; *Georgia-Pac. Corp. v. U.S. Plywood*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970). Ferring contends that its copying is irrelevant because it occurred before the UMN patents issued. But that ignores that Ferring decided to begin offering and selling its copycat product well after it knew the patents issued. That is quintessential willful behavior, as routinely recognized by courts. See Ex. B, *Puma Biotechnology, Inc. v. AstraZeneca Pharms. LP*, D.I. 408 at 4 (D. Del. Apr. 29, 2024) ("pre-patent conduct may also be used to support a finding of willfulness . . . [t]he same is true on the question of inducement"); *Kaufman Co. v.*

¹ Although Ferring has now dropped one of its invalidity arguments (despite refusing to engage in case narrowing for months), that does not impact the relevance of Ferring's copying, as its willfulness and inducement remain squarely at issue, as do damages issues.

Lantech, Inc., 807 F.2d 970, 978–79 (Fed. Cir. 1986) (rejecting defendant’s argument that pre-issuance copying should not be considered); *Upjohn Co. v. Syntro Corp.*, 1990 WL 79232, at *6 (D. Del. Mar. 9, 1990) (confirming liability for inducement could be based on pre-issuance acts).

While some cases have referenced “particularly egregious behavior” in connection with pre-issuance copying and willfulness, this is **not** a separate hurdle for willfulness, but for enhanced damages. *SRI Int’l, Inc. v. Cisco Sys., Inc.*, 14 F.4th 1323, 1330 (Fed. Cir. 2021) (“‘willfulness’ requires a jury to find **no more than** deliberate or intentional infringement”); *Bioverativ Inc. v. CSL Behring LLC*, 2020 WL 1332921, at *2 (D. Del. Mar. 23, 2020) (“egregious behavior [is] relevant” to enhancement). And even if it were, Ferring’s behavior would easily meet and exceed that threshold. As laid out in UMN/Finch’s summary judgment opposition (“SJ Opp.”), while at UMN, Lee Jones (Rebiotix’s founder) obtained at least the (1) then-confidential provisional application that led to the asserted UMN patents, (2) inventors’ confidential protocol, as well as an in-person demonstration of the making of the claimed compositions, and (3) other UMN-confidential documents, including evaluations of the patented inventions and business opportunities stemming therefrom. D.I. 281 at 2. [REDACTED]

[REDACTED] *Id.* at 3. Ms. Jones did this despite explicitly knowing that UMN was seeking patent protection (after all, one of the documents she took was a patent application) and in spite of an NDA that precluded her from using confidential UMN information (like the provisional) for purposes other than helping **UMN** commercialize its technologies including through patent licenses where appropriate (which was supposed to be Ms. Lee’s purpose in accessing these material is). Contrary to Ferring’s contention that certain of these facts are irrelevant, these are in fact crucial evidence of what Ms. Jones “in

fact subjectively believed,” a critical component of inducement and willfulness. *TecSec, Inc. v. Adobe Inc.*, 978 F.3d 1278, 1287 (Fed. Cir. 2020). In these circumstances, pre-issuance conduct is plainly relevant to willfulness and inducement, not to mention damages.

Ferring also asks the Court to decide that it did not copy the UMN Patents as a matter of law. Ex. 18-4 at 2-3. That is not properly a MIL. *See Ex. C, St. Jude Med. v. Volcano Corp.*, D.I. 395, at 1 (D. Del. Oct. 9, 2012) (“[c]opying is a fact intensive determination” that “cannot be decided” on a MIL); *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prods. Grp., LLC*, 879 F.3d 1332, 1353 (Fed. Cir. 2018) (willfulness is jury question); *Sonos, Inc. v. D&M Holdings Inc.*, 2017 WL 5633204, at *4 (D. Del. Nov. 21, 2017) (denying MIL and refusing “an absolute prohibition” on copying evidence). Regardless, as explained above and in Finch/UMN’s SJ Opp., there is substantial evidence of Ferring’s copying, and the jury is entitled to weigh these critical facts.

Finally, the relevance of Ferring’s copying (which is far from “minimal”) substantially outweighs any purported prejudice or risk of confusion. *DataTreasury Corp. v. Wells Fargo & Co.*, 2010 WL 11538713, at *27, *30 (E.D. Tex. Feb. 26, 2010); *see also Motio*, 2016 WL 4430452, at *10 (admission of copying evidence was not unduly prejudicial). Ferring claims that purported juror confusion with respect to infringement warrants exclusion, but neither of the cases it cites grapple with willfulness or inducement. *Shure*, 2021 WL 4974001, at *2 (“Copying is irrelevant to any issue in the case besides for secondary considerations”); *Finjan*, 2015 WL 4129193, at *5 (seeking preclusion of “evidence of copying as a secondary consideration”). Here, copying goes directly to at least willfulness, inducement, and damages, making it “an important factual dispute for the jury’s consideration,” *DataTreasury*, 2010 WL 11538713, at *27.

Because evidence of Ferring’s copying is highly relevant to numerous issues in the case, outweighing any purported prejudice or risk of juror confusion, Ferring’s motion should be denied.

EXHIBIT A



OCEAN TOMO[®]

A PART OF  **JS|HELD**

FERRING PHARMACEUTICALS INC., REBIOTIX INC.

v.

**FINCH THERAPEUTICS GROUP, INC., FINCH THERAPEUTICS,
INC., AND FINCH THERAPEUTIC HOLDINGS, LLC.**

Civil Action No. 21-01694-RGA

United States District Court for the District of Delaware

EXPERT REPORT OF JAMES E. MALACKOWSKI

July 28, 2023



5.1.4 Rebiotix Inc. – Counterclaim Defendant

Rebiotix is a Delaware corporation with a principal place of business in Roseville, Minnesota.⁵³ Rebiotix was formed in 2011 and was previously known as MikrobEX and TransBiome.⁵⁴ According to Rebiotix, it was founded on the belief that the power of the microbiome could be harnessed to treat debilitating diseases, and it works to ensure that the future of microbiome-based technologies will remain focused on what it believes are some of the greatest healthcare challenges of our time.⁵⁵

In 2009, Mr. Michael Berman (co-founder and Chairman of Rebiotix until 2018) investigated commercializing FMT through his company at the time, ConcepTx.⁵⁶ ConcepTx was an “exploration” that did not create a product and did not hire a full team.⁵⁷ It did not have laboratory space with microbiological-type equipment for FMT experimentation⁵⁸ Nor did any employees at ConcepTx have experience with FMT.⁵⁹

⁴⁶ FER_RBX01496511 – 554 at 520.

⁴⁷ FER_RBX01496511 – 554 at 520.

⁴⁸ FER_RBX01496511 – 554 at 520.

⁴⁹ FER_RBX01496511 – 554 at 520.

⁵⁰ FER_RBX01567938 – 8120 at 7973 – 8068.

⁵¹ <https://www.ferring.com/ferring-acquires-innovative-biotechnology-company-and-microbiome-pioneer-rebiotix-inc/>.

⁵² FER_RBX01496511 – 554 at 511.

⁵³ <https://www.rebiotix.com/>.

⁵⁴ Deposition of Lee Jones, April 21, 2023, pp. 22 – 25.

⁵⁵ <https://www.rebiotix.com/>.

⁵⁶ MERRIFIELD00000569; MERRIFIELD00000556; MERRIFIELD00000784; MERRIFIELD00000785; MERRIFIELD00000198; MERRIFIELD00000199; MERRIFIELD00000242; MERRIFIELD00000243.

⁵⁷ Deposition of Michael Berman, May 9, 2023, p. 71 – 72.

⁵⁸ Deposition of Edwin Hlavka, May 5, 2023, p. 185 – 187.

⁵⁹ Deposition of Michael Berman, May 9, 2023, p. 31 – 32; Deposition of Edwin Hlavka, pp. 27 – 33.



In January 2010, Mr. Berman's wife, Ms. Judy Berman (who worked at UMN), informed ConcepTx of Drs. Khoruts and Sadowsky's work.⁶⁰ ConcepTx then asked Dr. Khoruts for help,⁶¹ but Dr. Khoruts declined.⁶² That same month, because Drs. Khoruts and Sadowsky were working in the field, ConcepTx pushed forward with a provisional patent application,⁶³ which outside parties said was a "business patent" that had a "vague plan" and "pretty weak" IP.⁶⁴ In April 2010, Ms. Berman suggested that ConcepTx discuss freezing and sequencing bacteria with Dr. Sadowsky.⁶⁵ Dr. Sadowsky met with ConcepTx in June 2010, and Dr. Sadowsky suggested that ConcepTx contact UMN's patent office.⁶⁶ ConcepTx stopped operating by November 2010,⁶⁷ without having received funding for its FMT project.⁶⁸

After ConcepTx's FMT project was discontinued,⁶⁹ Ms. Lee Jones ("Ms. Jones") formed Rebiotix in 2011 and served as its President and CEO until December 31, 2021.⁷⁰ Immediately prior to forming Rebiotix, Ms. Jones was employed at the Venture Center at the UMN.⁷¹ From October 2010 through June 2011, Ms. Jones served as a CEO in Residence at the Venture Center.⁷² Ms. Jones' role was "to help identify possible business opportunities" for the University, and "if there was an idea or a technology that someone was interested in," "take that forward and commercialize it with the academics."⁷³

Through her work with the Venture Center, Ms. Jones learned of the concept of FMT from Drs. Khoruts and Sadowsky, who Ms. Jones described as "create[ing] a simple solution to the horrible patient problem of debilitating diarrhea and colitis caused by an infectious, intestinal bacteria ... (C. diff)."⁷⁴ Around four months after Ms. Jones learned of the concept of FMT from Drs. Khoruts and Sadowsky, Ms. Jones founded

⁶⁰ MERRIFIELD00000418.

⁶¹ UMN_0019653.

⁶² FER_RBX01548379.

⁶³ MERRIFIELD00000101

⁶⁴ MERRIFIELD00000140; FER_RBX01548184.

⁶⁵ UMN_0282398; UMN_0282401; see also UMN_0282419; FER_RBX01084677; FER_RBX01548381

⁶⁶ UMN_0030135; UMN_0260638; UMN_0209763

⁶⁷ MERRIFIELD00000612; MERRIFIELD00000628; MERRIFIELD00000615; MERRIFIELD00000616.

⁶⁸ Deposition of Edwin Hlavka, May 5, 2023, p. 269; M. Berman Dep. Tr. at 89:22–90:7.

⁶⁹ Deposition of Michael Berman, May 9, 2023, p. 321.

⁷⁰ Deposition of Lee Jones, April 21, 2023, pp. 21 – 22. During 2022, Ms. Jones served as an advisor to Ferring. Deposition of Lee Jones, April 21, 2023, pp. 26 – 27.

⁷¹ Defendants Finch Therapeutics Group, Inc., Finch Therapeutics, Inc., and Finch Therapeutics Holdings, LLC's First Amended Counterclaims and Answer to Complaint and Affirmative Defenses, March 7, 2022, p. 16.

⁷² Deposition of Lee Jones, April 21, 2023, p. 92.

⁷³ Deposition of Lee Jones, April 21, 2023, pp. 40 – 41, 92, Exhibit 5 (UMN_0283420 – 421).

⁷⁴ Deposition of Lee Jones, April 21, 2023, pp. 36 – 39, 48 – 52, 88 – 89, 194, 220, Ex. 18 (JONESL00003116 – 162).



Rebiotix.⁷⁵ Through the work of Drs. Khoruts and Sadowsky, Rebiotix was able to develop an FMT product.⁷⁶ [REDACTED]

Rebiotix developed a therapy to treat certain diseases, such as CDI, through use of the microbiome and FMT.⁷⁸ The therapeutic is referred to as product candidate RBX2660 or REBYOTA™. Ferring and Rebiotix describe REBYOTA™ as: “the first and only microbiome-based treatment approved by the U.S. Food and Drug Administration (FDA) to prevent recurrence of *Clostridioides difficile* (*C. diff*) infection.”⁷⁹

[REDACTED]

[REDACTED]

⁷⁵ Deposition of Lee Jones, April 21, 2023, pp. 90 – 91; Lee Jones Deposition Exhibits 2, 3, 7 (UMN_0016158); UMN_0090857.

⁷⁶ Deposition of Ms. Courtney Jones, March 24, 2023, p. 102 – 103.

⁷⁷ JONESL00001618; FER_RBX01291448; FER_RBX01302550; FER_RBX02848241; FER_RBX01997819; FER_RBX00678896; JONESL00003307; JONESL00000403; JONESL00000410; and JONESL00000411.

⁷⁸ Deposition of Lee Jones, April 21, 2023, pp. 48, 173, 181 – 182, Exhibit 14 (UMN_0017939 – 940).

⁷⁹ Ferring 2022 Annual Report at 9, 19, 24; REBYOTA Label at 1.

⁸⁰ UMN_0279871; UMN_0279932.

⁸¹ Plaintiffs’ First Supplemental Objections and Responses to Finch and UMN’s First Set of Interrogatories, February 17, 2023, pp. 153 – 156.

⁸² Plaintiffs’ First Supplemental Objections and Responses to Finch and UMN’s First Set of Interrogatories, February 17, 2023, p. 153 – 156; FER_RBX01303030; FER_RBX01305728.

⁸³ FER_RBX02868910; FER_RBX01965753; FER_RBX01965754; FER_RBX01965795; FER_RBX01965796; FER_RBX02868909; FER_RBX02868927; and BORODY_0016580.

⁸⁴ BORODY_0017327; BORODY_0017328.

⁸⁵ Complaint, December 1, 2021, p. 2.

⁸⁶ U.S. Patent No. 9,308,226, p. 1.



[REDACTED] Further, UMN publicly disclosed that it licensed its technology to CIPAC, Crestovo, and Finch, and had commercial relationships with them.⁸⁸ Ms. Jones and Rebiotix were also aware that CIPAC had interests in the UMN Asserted Patents, as well as the Finch Asserted Patents. [REDACTED]

[REDACTED]

[REDACTED]

⁸⁷ UMN_0190671; UMN_0043321; FER_RBX02730185; FER_RBX02730188; and FER_RBX01740478.

⁸⁸ <https://web.archive.org/web/20170801011847/https://research.umn.edu/units/techcomm/startups/university>; <https://research.umn.edu/units/techcomm/about-us/overview>; <https://license.umn.edu/product/pharmacological-agents-to-prevent-recurrent-c-diffinfection-20150362>; <https://www.businesswire.com/news/home/20171023005284/en/Finch-Therapeutics-and-Crestovo-Announce-Merger-to-Form-Finch-Therapeutics-Group-a-Leading-Fully-Integrated-Microbiome-Company>.

⁸⁹ UMN_0017939; UMN_0017940.

⁹⁰ FER_RBX02798547.

⁹¹ FER_RBX01268261; FER_RBX01092749; FER_RBX02753289; FER_RBX02724818; and FER_RBX02724373.

⁹² JONESL00003142; FER_RBX00907940; FER_RBX02592622; FER_RBX02592677; and FER_RBX02683454.

⁹³ Deposition of Lee Jones, April 21, 2023, pp. 36, 38 – 39.

⁹⁴ JONES00003116; JONES00003117; and JONESL00003142.

⁹⁵ JONESL00003189; and JONESL00003190.

⁹⁶ FER_RBX01964446; FER_RBX01965789; see also FER_RBX01467597.

⁹⁷ Deposition of Kristin Wannerberger, May 24, 2023, pp. 110; Deposition of Greg Fluet April 14, 2023, Exhibit 11 (FER_RBX02840624 – 809 at 637).



INTELLECTUAL CAPITAL EQUITY

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹⁸ Deposition of Kristin Wannerberger, May 24, 2023, pp. 110–112; Deposition of Greg Fluet April 14, 2023 Exhibit 11 (FER_RBX02840624 – 809 at 648).

⁹⁹ FER_RBX02951435; FER_RBX02951438; FER_RBX02951441; FER_RBX02951444; FER_RBX02952244; and FER_RBX02952279.

¹⁰⁰ FER_RBX01719332 at 333.

¹⁰¹ FER_RBX01895073.

¹⁰² FER_RBX02738156 – 474 at 175.

¹⁰³ FER_RBX02738156 – 474 at 177.

HIGHLY CONFIDENTIAL INFORMATION



INTELLECTUAL CAPITAL EQUITY

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Neither Ferring nor Rebiotix acted to avoid or mitigate infringement.

[REDACTED]

¹⁰⁴ FER_RBX02738156 – 474 at 251.

¹⁰⁵ FER_RBX02738156 – 474 at 254.

¹⁰⁶ FER_RBX02738156 – 474 at 403.

¹⁰⁷ FER_RBX02800353–565; FER_RBX02797878–98063.

¹⁰⁸ Deposition of Lee Jones, April 21, 2023, p. 273, 81 – 84, 187 – 188.

¹⁰⁹ Ferring/Rebiotix Reply to Counterclaims, February 7, 2023, p. 97. The most recent Asserted Patent to issue is U.S. Patent No. 11,541,080, which issued January 3, 2023.

¹¹⁰ Ferring 2022 Annual Report, pp. 54 – 57.

¹¹¹ FER_RBX00888083; FER_RBX00889214; FER_RBX00902542; FER_RBX00902546; FER_RBX00904385; FER_RBX00905383; FER_RBX00906295; FER_RBX02328898; FER_RBX01722455.

¹¹² FER_RBX00904340; FER_RBX00905454.

HIGHLY CONFIDENTIAL INFORMATION



[REDACTED]

[REDACTED]. These entries suggest that Rebiotix/Ferring anticipated litigation with Finch/UMN years before launching REBYOTA™. [REDACTED]

[REDACTED] Despite claiming privileged advice related to the Finch Asserted Patents and the UMN Asserted Patents, Ferring/Rebiotix have not asserted an advice of counsel defense or produced any opinions of counsel related to the Asserted Patents and have made clear they do not intend to do so.¹¹⁸

[REDACTED]

Ferring/Rebiotix used Finch's statements in its SEC filings as a basis for bringing suit a year before launching a product, and were not only on notice of the Asserted Patents, knew of the UMN patents and, based on Ferring/Rebiotix's pleadings, were concerned that Finch would exercise its patent rights. [REDACTED]

¹¹³ FER_RBX01723719; FER_RBX01723726; FER_RBX01724747; FER_RBX02019752; FER_RBX02021576.

¹¹⁴ FER_RBX01568915; FER_RBX02220265; FER_RBX02220266; FER_RBX01714579.

¹¹⁵ FER_RBX01740478.

¹¹⁶ FERRBXPRIV02766; FERRBXPRIV02772; FERRBXPRIV01676; FERRBXPRIV02509; FERRBXPRIV00110; FERRBXPRIV00111; FERRBXPRIV00189; FERRBXPRIV00191; FERRBXPRIV00218; and FERRBXPRIV00242.

¹¹⁷ FER_RBX02951435; FER_RBX02951438; FER_RBX02951441; and FER_RBX02951444.

¹¹⁸ Plaintiffs' First Supplemental Objections and Responses to Finch and UMN's First Set of Interrogatories, February 17, 2023, pp. 157 – 159.

¹¹⁹ Complaint, December 1, 2021, Exhibit 1, p. 136.

¹²⁰ Complaint, December 1, 2021.

¹²¹ FER_RBX02739273; FER_RBX02739276; FER_RBX01923806; FER_RBX01923810; FER_RBX02727049; FER_RBX02727056; FER_RBX02728418; FER_RBX02728419; FER_RBX02745321; FER_RBX02745325; FER_RBX02753493; FER_RBX02753499; FER_RBX02763582; FER_RBX02870619; FER_RBX02870623; FER_RBX02870877; FER_RBX02870881; FER_RBX02948942; FER_RBX02948947; FER_RBX02950508; FER_RBX02950513; FER_RBX02977788; and FER_RBX02978079.



INTELLECTUAL CAPITAL EQUITY

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹²² Complaint, December 1, 2021, pp. 12 – 17.

¹²³ FER_RBX01249917; and FER_RBX02022124.

¹²⁴ FER_RBX02874488.

¹²⁵ FER_RBX02991515.

¹²⁶ Deposition of Gregory Fluet, June 2, 2023, p. 104 – 105, and Exhibits.

¹²⁷ Deposition of Gregory Fluet, June 2, 2023, Exhibits 3 – 4. G.

¹²⁸ Deposition of Gregory Fluet, June 2, 2023, p. 93 - 96.

¹²⁹ Deposition of Gregory Fluet, June 2, 2023, p. 107.

¹³⁰ FER_RBX02951449.

HIGHLY CONFIDENTIAL INFORMATION



• [REDACTED]

[REDACTED]

[REDACTED]

Thus, I find that Factor Nos. 9 and 10 would tend to favor the licensor in this hypothetical negotiation.

9.1.10 Factor No. 11: The extent to which the infringer has made use of the invention; and any evidence probative of the value of that use.

According to Finch/UMN, REBYOTA™ embodies and/or utilizes the Asserted Patents. Finch/UMN contend that Ferring/Rebiotix copied certain of the claimed inventions in developing REBYOTA™.⁵⁰⁷

⁴⁹⁹ FER_RBX01472081 – 248 at 141.

⁵⁰⁰ FER_RBX01472081 – 248 at 141.

⁵⁰¹ FER_RBX01472081 – 248 at 098.

⁵⁰² FER_RBX01472081 – 248 at 105.

⁵⁰³ FER_RBX01472081 – 248 at 141.

⁵⁰⁴ FER_RBX01382837 – 921 at 838.

⁵⁰⁵ FER_RBX01382837 – 921 at 847.

⁵⁰⁶ FER_RBX01382837 – 921 at 865 and 892.

⁵⁰⁷ Defendants' Response and Objections to Plaintiffs' Interrogatory No. 4, pp. 423 – 424.



On February 14, 2023, Ferring/Rebiotix announced the availability of REBYOTA™. According to the announcement, “REBYOTA is the first and only microbiome-based treatment approved by the U.S. Food and Drug Administration (FDA) to prevent recurrence of *Clostridioides difficile* (*C. diff*) infection in individual 18 years of age and older, following antibiotic treatment for recurrent *C. diff* infection.”⁵⁰⁸

According to Ferring’s 2022 Annual Report, sales of REBYOTA™ “are expected to grow significantly in the years following the launch in 2023.”⁵¹⁰ Ferring’s projections indicate that REBYOTA™ annual revenues will increase from \$129.1 million in 2024 to \$319.0 million in 2029, before declining to \$286.4 million in 2031. For the period 2024 through 2031, Ferring projects total REBYOTA™ revenue of nearly \$2.1 billion.⁵¹¹

Thus, I find that Factor No. 11 would tend to favor the licensor in this hypothetical negotiation.

9.1.11 Factor No. 12: The portion of the profit or the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions.

Similar to Factors No. 1 and No. 2, Factor No. 12 relates to the Market Approach and considers licenses and licensing practices within the relevant industry. I have considered third-party license agreements in connection with my Market Approach evaluation as set forth in Appendix 6.1, one of which is the Seres/Nestlé Agreement.

The Seres/Nestlé Agreement granted rights to microbiome technology to commercialize therapeutics relating to CDI. As indicated above, Nestlé agreed to an upfront fee of \$175 million, the potential milestone payments of up to \$525 million, and a 50.0 share of profits from sales of the licensed product. I would note that 50.0 percent of REBYOTA™’s reported gross profitability⁵¹² is about 40.0 percent and 50.0 percent of Finch’s projected operating profitability is about 25.4 percent.

The impact of Factor No. 12 is also reflected in my quantitative analysis described in Section 8.3.4.

⁵⁰⁸ <https://ferringusa.com/?press=ferring-pharmaceuticals-announces-availability-of-rebyota-fecal-microbiota-live-jslm-the-first-and-only-fda-approved-microbiome-based-treatment-for-the-prevention-of-r#:~:text=REBYOTA%20is%20the%20first%20and,diff%20infection.>

⁵⁰⁹ Figure 8.

⁵¹⁰ Ferring Annual Report, p. 95.

⁵¹¹ Appendix 4.2.

⁵¹² Appendix 4.1.



INTELLECTUAL CAPITAL EQUITY

11 SIGNATURE

Respectfully submitted,



James E. Malackowski

Date: July 28, 2023

HIGHLY CONFIDENTIAL INFORMATION

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

WYETH, LLC,)
)
Plaintiff,)
)
vs.) Case No. 21-cv-1338-MFK
)
ASTRAZENECA PHARMACEUTICALS)
LP and ASTRAZENECA AB,)
)
Defendants.)

RULINGS ON CERTAIN OF DEFENDANTS' MOTIONS IN LIMINE

in this order, the Court rules on some, but not all, of the motions *in limine* filed by the defendants. On the defendants' remaining motions and the motions filed by the plaintiff, the Court has specific questions or wishes to hear argument. That will be done at the final pretrial conference set for tomorrow, April 30.

The numbered paragraphs below correspond to the numbering used in the defendants' motions.

1. **2014 acquisition proposal.** In their first motion, defendants move to bar any reference to a 2014 proposal by AstraZeneca to acquire Puma. Plaintiff agrees to the relief sought in the motion. The Court grants this motion.

2. **Pre-suit discussions.** In their second motion, defendants move to bar any reference to pre-lawsuit communications between AstraZeneca and Puma, which took place during two periods: 2016 and 2020-21. In 2016, Puma contacted AstraZeneca about licensing its patent portfolio, which evidently included the then-pending application for at least one of one of the patents in suit. Though this contact did

not result in any agreements or even, it appears, extended negotiations, this episode is relevant and admissible on the question of willful infringement, because it tends to show defendants' awareness of the patent(s).

In 2020-21, Puma contacted AstraZeneca regarding sublicensing of rights to Wyeth's intellectual property, including one or both of the patents in suit. There were proposals that went back and forth, but no deal was concluded. Defendants contend that nothing about this is admissible pursuant to Federal Rule of Evidence 408; they say that litigation was at least contemplated and that their discussions were conducted under an agreement that said the discussions would be governed by Rule 408.

Rule 408(a) says that evidence of offering a valuable consideration to compromise a claim, and statements or conduct during compromise negotiations about the claim, is not admissible "either to prove or disprove the validity or amount of a disputed claim" or to impeach. Fed. R. Evid. 408(a). This, by its terms, does not preclude evidence regarding the discussions for the purpose of showing defendants' knowledge of the patents and the possibility of infringement. These are the primary purpose for which plaintiff says it wishes to introduce this evidence. See Pl.'s Resp. to Defs.' Mots. In Limine at 1; *Power Integrations, Inc. v. ON Semiconductor Corp.*, 396 F. Supp. 3d 851, 860 (N.D. Cal. 2019) (allowing evidence of compromise to prove notice); *Samsung Elecs. Co. v. Quanta Computer, Inc.*, No. C-00-4524, 2006 WL 2850028, at *5 (N.D. Cal. Oct. 4, 2006) (settlement negotiations admissible to show notice of the patent and the patent holder's assertion of infringement). The Court therefore overrules defendants' motion, but as plaintiff proposes, it must omit anything regarding the proposed royalty rates. See Pl.'s Resp. to Defs.' Mots. In Limine at 3 n.7.

Plaintiff also contends the evidence of the 2020-21 negotiations is admissible to show "commercial acquiescence," a consideration regarding obviousness that roughly translates to whether the novelty of the patent has effectively been acknowledged via licensing activity. *See generally Securitypoint Holdings, Inc. v. United States*, 129 Fed. Cl. 25, 48 (Fed. Cl. 2016). "[B]ut the mere fact of licensing alone may not be enough to prove a patent not obvious if it cannot also be shown that the licensees did so out of respect for the patent rather than to avoid litigation expense." *Id.* (citing *Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 316 (Fed. Cir. 1985)). This means the context—in particular whether the communications arose from an actual or at least threatened legal claim—is likely determinative, if not on the Rule 408 question, then at least on the probative value of the communications regarding the "commercial acquiescence" issue. On this both sides have punted: defendants say simply that "[t]here can be no dispute" that litigation was threatened or probable, offering no support; and plaintiff dismisses the point in a footnote, saying that the Court need not decide it. Both sides should be prepared at the final pretrial conference to provide, on this point, what they failed to provide in their briefs. The Court will then determine the admissibility of the 2020-21 evidence for this additional purpose.

3. **Third party analyst reports.** The Court grants defendants' motion to bar reference to certain analyst reports discussing the patents in suit or related applications that were referenced in communications from Puma's CEO. This evidence is classic hearsay, and plaintiff cites no potentially applicable exception to the hearsay rule. The evidence is excluded—for both sides.

5. **Pre-issuance conduct by defendant.** Defendants ask the Court to bar

reference to their conduct prior to the March 2020 issuance of the patents for the purpose of proving willful infringement and/or inducement of infringement. The Court denies the motion. "[A]lthough willfulness is generally based on conduct that occurred after a patent issued, pre-patent conduct may also be used to support a finding of willfulness." *3M Co. v. Johnson & Johnson Orthopaedics, Inc.*, 976 F.2d 1559, 1581 (Fed. Cir. 1992). The same is true on the question of inducement. See *Nat'l Presto Indus., Inc. v. W. Bend Co.*, 76 F.3d 1185, 1196 (Fed. Cir. 1996). Defendants' contrary authorities are either inapplicable or unpersuasive. (The Court also notes in this regard that, as plaintiff points out, concerns in earlier cases regarding one's knowledge of pending patent applications "are no longer valid" after 1999, when the law was changed to provide for routine publication of patent applications eighteen months after the application's effective filing date. See *WMD Indus., Inc. v. IPS Corp.*, 721 F. App'x 959, 970 n.4 (Fed. Cir. 2018)).

6. **Assertions that Tagrisso is a "copy" of the patents in suit.** The Court overrules defendants' motion to bar plaintiff from contending that the accused product Tagrisso is a "copy" of the patents in suit. This is a legitimately disputed point and appropriately a matter for argument. One significant caveat for plaintiff, however, is that introduction of evidence or argument on this point might well open the door to other evidence that plaintiff has moved to exclude. See Pl.'s Mot. In Limine No. 3 (seeking to exclude evidence of defendants' patents and patent applications). For this reason, plaintiff should be prepared to tell the Court at the final pretrial conference whether it intends to actually offer testimony or argument on this point.

8. **Payments to expert witnesses reported on Open Payments.** The

Court overrules defendants' request to preclude plaintiff from introducing evidence regarding payments to defendants' expert witnesses reported on the Open Payments database, which as far as the Court is aware is a government-maintained website reporting payments to medical providers by, among others, pharmaceutical companies. Evidence regarding payments from parties or others affiliated with them is a legitimate topic of cross-examination for bias, so the Court denies the motion. Defendants argue that the Open Payments site is unreliable and sometimes misattributes to an individual physician a payment that actually was made to an institution with which the physician is affiliated. But even then, a payment may be relevant to show bias, so long as the impetus for the payment involved the physician.

For these reasons, witnesses appropriately may be cross examined regarding relevant payments shown on the Open Payments site. That said, plaintiffs have failed to make the case that data from the site is *itself* independently admissible in evidence. To permit that, the party seeking to admit the data would have to lay a foundation for its admission.

9. **Alleged status of the patents in suit as "blocking" patents.** The Court overrules defendants' objection to testimony by plaintiff's infringement expert Dr. Weiss (relied upon by its damages expert Dr. Rao) referring to the patents-in-suit as "blocking patents." The Court understands this term to express the concept that an alleged infringer could not conduct its allegedly infringing activities without practicing the patent. Testimony in this regard is relevant on the question of apportionment of a damages award to the incremental value that the patented invention is claimed to have added to the infringing product. The theory offered by plaintiff's expert on this point is a legitimate

theory, so long as it is supported by the evidence. *See, e.g., Sprint Comm'cns Co. v. Time Warner Cable, Inc.*, 255 F. Supp. 3d 1134, 1139 (D. Kan. 2017). And the Court is persuaded that there is sufficient support in the record to allow testimony and argument along these lines. Whether the theory actually applies here is appropriately a matter for cross-examination and presentation of contrary evidence and argument, not exclusion. *See, e.g., Plexxicon, Inc. v. Novartis Pharms. Corp.*, No. 4:17-cv-04405, 2021 WL 97544, at *4-5 (N.D. Cal. Jan. 12, 2021).

11. Expert testimony regarding AstraZeneca's state of mind. Defendants identify two places in which the reports of plaintiff's experts include opinions regarding AstraZeneca's knowledge and/or intent. Plaintiff's expert Weiss's report includes the following statement: "*Defendants know and intend* that the commercial manufacture, use, importation, marketing, sale, and/or offer for sale of TAGRISSO® will cause direct infringement" of a particular patent claim. Weiss Report ¶ 129 (emphasis added). And plaintiff's expert Hausheer's report includes the following statement: "AstraZeneca systematically and *intentionally copied* the inventors' work, which led to the discovery and development of TAGRISSO® for use within the claimed methods." Hausheer Report ¶ 23 (emphasis added). Opinions regarding knowledge and intent, including those just quoted and others like them, are hereby excluded. An expert may appropriately address the evidentiary predicate upon which a determination of knowledge or intent may be made, but none of the experts in this case have been shown to have a foundation that would enable them to appropriately render an opinion that would be helpful to the jury regarding whether the evidence shows that a person or entity had knowledge of a fact or acted willfully, intentionally, or recklessly.

Conclusion

For the reasons described in this order, the Court grants defendants' motions *in limine* 1, 3, and 11 and denies defendants' motions *in limine* 2, 5, 6, 8, and 9.

Defendants' motions 4, 7, and 10 and all of plaintiff's motions remain for determination at the final pretrial conference.

Date: April 29, 2024


MATTHEW F. KENNELLY
United States District Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ST. JUDE MEDICAL CARDIOLOGY
DIVISION, INC., ST. JUDE MEDICAL
SYSTEMS AB, and ST. JUDE MEDICAL
S.C., INC.,

Plaintiffs,

V.

VOLCANO CORPORATION,

Defendant.

Civil Action No. 10-631-RGA

ORDER CONCERNING VOLCANO'S MOTIONS IN LIMINE

The Court having considered Volcano's Motions *In Limine* (D.I. 380, Tab 11);

IT IS HEREBY ORDERED that:

1. Volcano's Motion *in Limine* No. 1 to exclude evidence of alleged copying by Volcano is **DENIED**. Copying is irrelevant to the written description requirement. Copying is a fact intensive determination that cannot be decided now.

2. Volcano's Motion in *Limine* No. 2 to exclude evidence obtained during inequitable conduct discovery is **GRANTED IN PART** and **DENIED IN PART**. Evidence provided or obtained during inequitable conduct discovery can be used for purposes of cross-examination. Such evidence, however, cannot be used affirmatively to support an infringement/non-infringement or validity/invalidity argument.

3. Volcano's Motion *in Limine* No. 3 to exclude evidence regarding St. Jude's equitable defenses is **GRANTED IN PART** and **DENIED IN PART**. Evidence that tends to prove an equitable defense and no other will be excluded. Evidence of correspondence between

St. Jude and Volcano in 1997-99, the probative value of which depends on silence, is excluded under Federal Rule 403 in view of the ambiguous nature of the evidence and distance in time from the relevant time period for infringement.

4. Volcano's Motion *in Limine* No. 4 to exclude evidence regarding non-asserted patents EP 1,658,808 and U.S. 6,908,442 is **GRANTED IN PART** and **DENIED IN PART**. Evidence of or reference to European Patent No. 1,658,808 is excluded as irrelevant to the written description requirement of the '965 Patent. The motion is **TENTATIVELY DENIED** with respect to U.S. Patent No. 6,908,442 because patents are presumptively valid and separate patentability is relevant to infringement analysis under the doctrine of equivalents.

5. Volcano's Motion *in Limine* No. 5 to exclude evidence of the expiration date of U.S. Patent No. 5,178,159 is **GRANTED**. So long as there is no dispute about the dates of particular accused infringing products being made, used, offered for sale or sold before November 2, 2008, there is no reason for the jury to hear the expiration date or the fact that the '159 Patent is expired.

6. Decision on Volcano's Motion *in Limine* No. 6 to exclude evidence that St. Jude sponsored the F.A.M.E. studies is deferred.

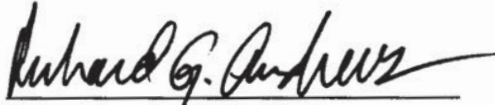
7. Volcano's Motion *in Limine* No. 7 to exclude evidence previously stricken by the Court is **GRANTED**¹ with leave for St. Jude to apply for leave to use the evidence should Volcano "open the door."

8. Volcano Motion *in Limine* No. 8 to exclude the proffered evidence of the CardioLab and EP-Workmate Systems is **DENIED**.

¹ As to the video of the Radianalyzer demonstration at the 2001 Euro PCR, the Court will separately rule on the objections to the Magistrate Judge's decision. (D.I. 243).

9. Volcano's *Motion in Limine* No. 9 to exclude evidence related to SmartFlow from after December 19, 2001 is **DENIED**.

Entered this 9th day of October, 2012.


United States District Judge

PROPOSED PRETRIAL ORDER

EXHIBIT 18.4

FERRING/REBIOTIX'S REPLY IN SUPPORT OF MOTION
IN LIMINE NO. 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

FERRING PHARMACEUTICALS INC.,
REBIOTIX INC.

Plaintiffs,

V.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., and FINCH
THERAPEUTICS HOLDINGS, LLC.

Defendants.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., FINCH
THERAPEUTICS HOLDINGS, LLC, and
REGENTS OF THE UNIVERSITY OF
MINNESOTA

Counterclaim-Plaintiffs/Reply Defendants,

V.

FERRING PHARMACEUTICALS INC., and
REBIOTIX, INC.

Counterclaim-Defendants/Reply Plaintiffs.

C.A. No. 21-1694-JLH

FILED UNDER SEAL

FERRING/REBIOTIX'S REPLY IN SUPPORT OF ITS MOTION IN LIMINE NO. 4

Finch is well aware of how prejudicial purported “copying” evidence can be in a patent infringement suit. That is why it is fighting so hard to keep that as a theme in the case. But its allegations of copying have no legal basis. Secondary indicia are no longer at issue for the UMN patents, because Ferring is not pursuing obviousness. And for purposes of willfulness, so-called “copying” evidence relating to a patent that has yet to issue is not admissible, absent exceptional circumstances. *Bioverativ Inc. v. CSL Behring LLC*, No. 17-914-RGA, 2020 WL 1332921, at *3 (D. Del. Mar. 23, 2020). This is not a case where the accused infringer duplicated a patentee’s product wholesale. Finch never even achieved an approved product, and general fecal transplant technology has long been in the prior art. Rather, here, Ms. Jones explored the possibility of UMN working together with her, and then the parties went separate ways. It cannot be correct that mere exposure to materials of another amounts to willfulness, especially where the asserted patents would not issue for years. The law requires something egregious. *Id.* (considering whether pre-issuance conduct amounted to “elaborate copying” or “‘consciously wrongful,’ ‘malicious’ behavior.”). Notably, Finch cannot and does not show that Ferring implemented an express protocol or process from a UMN document or patent application in a consciously wrongful or malicious manner. Its allegations are far more amorphous. Finch should not be able to imply an NDA breach where UMN saw no basis for such a claim.

Nor does Finch’s vague contention that “copying” can be relevant to issues besides secondary indicia overcome the significant prejudice to Ferring if this evidence is admitted. Those same arguments were raised and rejected in *Shure* and *Finjan*, where the party offering copying evidence also argued it was relevant to other issues. (See D.I. 661 in *Shure Inc. v. Clearone, Inc.*, 1:19-cv-01343, at pdf pgs. 9-11 (D. Del. Nov. 16, 2021)); *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-CV-3999-BLF, 2015 WL 4129193, at *5-6 (N.D. Cal. July 8, 2015).

Dated: July 15, 2024

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*Attorneys for Ferring Pharmaceuticals Inc.
and Rebiotix Inc.*

PROPOSED PRETRIAL ORDER

EXHIBIT 18.5

**FERRING/REBIOTIX'S MOTION *IN LIMINE* FOR
ADVERSE INFERENCE**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FERRING PHARMACEUTICALS INC.,
REBIOTIX INC.

Plaintiffs,

v.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., and FINCH
THERAPEUTICS HOLDINGS, LLC.

Defendants.

C.A. No. 21-1694-JLH

FILED UNDER SEAL

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., FINCH
THERAPEUTICS HOLDINGS, LLC, and
REGENTS OF THE UNIVERSITY OF
MINNESOTA

Counterclaim-Plaintiffs/Reply Defendants,

v.

FERRING PHARMACEUTICALS INC., and
REBIOTIX, INC.

Counterclaim-Defendants/Reply Plaintiffs.

FERRING/REBIOTIX’S MOTION IN LIMINE FOR ADVERSE INFERENCE

I. INTRODUCTION

Ferring Pharmaceuticals Inc. and Rebiotix Inc. (collectively “Ferring”) is entitled to evidentiary sanctions because Finch Therapeutics Group, Inc., Finch Therapeutics, Inc, Finch Therapeutics Holdings, LLC, and Regents of the University of Minnesota (collectively “Finch”) deprived Ferring the opportunity to depose Dr. Thomas Borody—the only named inventor on four of the patents-at-issue in this case. Ferring pursued Dr. Borody’s deposition for over a year. Finch delayed. And, after Dr. Borody told Finch his testimony would be contrary to its interests, Finch allowed Dr. Borody to unilaterally cancel his deposition. Finch’s actions have prejudiced Ferring. As a result, Ferring is entitled to an adverse inference that Dr. Borody’s testimony would have been unfavorable to Finch and the admission of documents that could have been authenticated through Dr. Borody’s deposition testimony.¹

II. BACKGROUND

Ferring first sought the deposition of Dr. Borody in November 2022. Finch’s counsel represented Dr. Borody and Finch agreed to pay their fees. (Exs. A, B, C.) For more than a year, Ferring attempted to secure Dr. Borody’s deposition. In January 2023, the parties agreed to schedule Dr. Borody’s deposition for mid-March in Los Angeles, California (Ex. D.) Finch informed Ferring that [REDACTED] and would not be able to travel from Australia. (*Id.*) Finch committed to providing a new date and confirmed that it “intend[ed] to bring Dr. Borody

¹ The parties have stipulated to the authenticity of documents produced by a party or pursuant to a subpoena in this matter. (*See* Pretrial Order, ¶ 32). Courts routinely permit admission of trial exhibits without a sponsoring witness. *See, e.g., TEK Glob., S.R.L. v. Sealant Sys. Int’l, Inc.*, No. 11-CV-00774-VC, 2017 WL 952955, at *1 (N.D. Cal. Mar. 12, 2017) (“There is no freestanding ‘sponsoring witness’ requirement in the Federal Rules of Evidence.”); *Adams v. United States*, No. CIV 03-0049-E-BLW, 2009 WL 1884387, at *2 (D. Idaho June 28, 2009) (same); *Innovation Toys, LLC v. MGA Ent., Inc.*, No. C.A. 07-6510, 2012 WL 5398476, at *8 (E.D. La. Nov. 4, 2012) (same); *New York v. UPS*, 942 F.3d 554, 593 (2d Cir. 2019) (same).

to trial.” (Ex. E.) Finch then requested that Ferring take Dr. Borody’s deposition in Australia or proceed remotely in May or June 2023. (Ex. F.) Ferring agreed to travel to Australia and Finch set the deposition for June 6, the day before fact discovery closed. (Exs. G, H.)

On May 20, Dr. Borody canceled his deposition because [REDACTED] to sit for his deposition. (Ex. I.) Despite Finch’s repeated assurances, Dr. Borody’s deposition was never rescheduled, and fact discovery closed. (D.I. 193.)

On May 18, 2023—just two days before Ferring was informed Dr. Borody would not appear—Dr. Borody’s personal attorney informed Finch that the four patents-at-issue in his name were not properly assigned to Finch and Finch did not own them. (Ex. J.) Dr. Borody’s attorney further stated that “[w]hile [Dr. Borody] will co-operate with the requested deposition, clearly it will not assist Finch if he truthfully deposes matters which are contrary to its interests.” (*Id.*) Following discussion with Finch, Dr. Borody canceled his deposition because of [REDACTED] the next day. (Exs. K, I.)

III. ARGUMENT

The Court should exercise its “inherent power to control litigation” to remedy Finch’s misconduct and ensure a fair trial. *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1326 (Fed. Cir. 2011) (internal citations omitted); *see also* FED. R. CIV. P. 37(b)(2). In considering the proper remedy, the Court must assess ““(1) the degree of fault of the [offending party] . . . ; (2) the degree of prejudice suffered...; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party”” *Victaulic Co. v. HiTHERM, LLC*, No. 21-cv-5077, 2024 WL 1364258, at *4 (E.D. Pa. Mar. 28, 2024) (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994)). All three factors weigh in favor of Ferring’s request.

First, Finch is at fault in the same way counsel in *Victaulic* was at fault. Finch’s counsel represented that they were counsel for Dr. Borody and that he would be available for a

deposition on June 6, 2023. *Id.* at *3. (*See also* Exs. G, H.) Despite these assurances, Dr. Borody's deposition was canceled "at the last minute" and "ultimately never took place." *Victaulic*, 2024 WL 1364258, at *1. (*See also* Exs. I, J, K.)

Second, Ferring has suffered significant prejudice "by not being able to depose a key witness[.]" *Victaulic*, 2024 WL 1364258, at *4. As the sole inventor on four of the six patents at issue, Dr. Borody presumably would have offered key testimony that he retains all rights to those patents. Ferring also would have been able to authenticate and lay the foundation for admission of certain documents at trial. Finch's misconduct threatens to "interfere[] with the rightful resolution of the case." *Micron Tech., Inc. v. Rambus Inc.*, 917 F. Supp. 2d 300, 319 (D. Del. 2013).

Third, as in *Victaulic*, "a sanction lesser than an adverse inference would fail to remedy the prejudice" as Ferring lost the ability to secure critical testimony regarding Finch's standing to assert Dr. Borody's patents. 2024 WL 1364258, at *4; *see also C.B. v. Moreno Valley Unified Sch. Dist.*, 2023 WL 6782320, at *9 (C.D. Cal. Sept. 18, 2023) (granting an adverse inference instruction after "failures to properly appear for deposition after months of promises to do so"); *Sec. & Exch. Comm'n v. Hong*, No. 220CV04080MCSRAO, 2021 WL 4923310, at *1 (C.D. Cal. Oct. 21, 2021) (providing adverse inference instruction based on refusal to appear for a deposition); *Chase Home Fin. LLC v. Maalouf*, No. CV WGC-07-1645, 2009 WL 10701991, at *4 (D. Md. Mar. 25, 2009), *aff'd*, 376 F. App'x 328 (4th Cir. 2010) (same); *De Saro v. United States*, 305 F. Supp. 2d 1330, 1333 (S.D. Fla. 2004) (same).

The Court should follow this guidance and grant Ferring's request for an adverse inference. And to assure fairness of the proceedings, the Court should use its discretion to admit documents into evidence on which Dr. Borody could have served as the sponsoring witness.

Dated: June 27, 2024

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sdoudar@mofo.com

WOMBLE BOND DICKINSON (US) LLP

/s/ Mary W. Bourke

Mary W. Bourke (#2356)
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Daniel M. Attaway (#5130)
Zachary Murphy (#6881)
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*Attorneys for Ferring Pharmaceuticals Inc.
and Rebiotix Inc.*

PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit A to Ferring/Rebiotix's Motion in Limine No. 5

Boots, Kimberly P.

From: Ross, Ashley <ashley.ross@kirkland.com>
Sent: Friday, December 2, 2022 1:55 PM
To: Attaway, Daniel
Cc: rebyota; Afinogenova, Alina; Alper, Adam R.; Carson, Patricia A.; De Vries, Mike W.; *farnan@rlf.com; #Finch_Rebiotix; Pedi, Nicole K.
Subject: RE: Ferring Pharmaceuticals et al. v. Finch Therapeutics Group, Inc. et al. 21-1694-RGA: D.I. 73-74

External (ashley.ross@kirkland.com)

[Report This Email](#) [FAQ](#)

Daniel,

Dr. Allegetti is not available during the range indicated in the Notice of Deposition served below. She is instead available on January 10. Please confirm that Plaintiffs will take her deposition then.

Regards,

Ashley

Ashley Ross

KIRKLAND & ELLIS LLP
601 Lexington Avenue, New York, NY 10022
T +1 212 446 4954
F +1 212 446 4900

ashley.ross@kirkland.com

From: Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>
Sent: Wednesday, November 30, 2022 3:13 PM
To: Afinogenova, Alina <alina.afinogenova@kirkland.com>; Alper, Adam R. <aalper@kirkland.com>; Carson, Patricia A. <patricia.carson@kirkland.com>; De Vries, Mike W. <michael.devries@kirkland.com>; *farnan@rlf.com <farnan@rlf.com>; Ross, Ashley <ashley.ross@kirkland.com>; #Finch_Rebiotix <Finch_Rebiotix@kirkland.com>; Pedi, Nicole K. <Pedi@rlf.com>
Cc: rebyota <rebyota@wbd-us.com>
Subject: Ferring Pharmaceuticals et al. v. Finch Therapeutics Group, Inc. et al. 21-1694-RGA: D.I. 73-74

Dear Counsel,

Attached please find the following:

- (1) *Plaintiffs' Notice of Deposition of Dr. Jessica Allegetti*, and
- (2) *Plaintiffs' Notice of Subpoena to Testify Directed to Thomas Borody*.

Regards,

Kimberly

Kimberly P. Boots

Paralegal

Womble Bond Dickinson (US) LLP

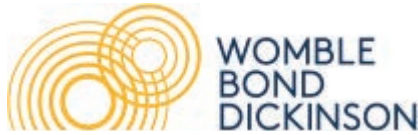
d: 302-252-4342

e: Kimberly.Boots@wbd-us.com

1313 North Market Street

Suite 1200

Wilmington, DE 19801



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PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit B to Ferring/Rebiotix's Motion in Limine No. 5

Boots, Kimberly P.

From: Ross, Ashley <ashley.ross@kirkland.com>
Sent: Monday, July 18, 2022 9:57 PM
To: Attaway, Daniel
Cc: Afinogenova, Alina; Alper, Adam R.; Parrado, Alvaro; Carson, Patricia A.; De Vries, Mike W.; *farnan@rlf.com; Pedi, Nicole K.; Horstman, N. Kaye; rebyota; Boots, Kimberly P.
Subject: Rebiotix v. Finch || Dr. Borody

External (ashley.ross@kirkland.com)

[Report This Email](#) [FAQ](#)

Counsel,

Kirkland can accept service of a subpoena on Dr. Borody's behalf.

Best regards,

Ashley

Ashley Ross

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601 Lexington Avenue, New York, NY 10022
T +1 212 446 4954
F +1 212 446 4900

ashley.ross@kirkland.com

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PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit C to Ferring/Rebiotix's Motion in Limine No. 5

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Patricia A. Carson
To Call Writer Directly:
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October 6, 2022

Dr. Thomas J Borody
MD PhD DSc FRACP FACP FACG AGAF FRSN
Director
Centre for Digestive Diseases
Lvl 1, 229 Great North Road
Five Dock NSW 2046
Australia
Phone: 61 2 9713 4011
Fax: 61 2 9712 1675
www.cdd.com.au

Re: *Ferring Therapeutics Inc. and Rebiotix Inc. v. Finch Therapeutics et. al.*,
C.A. No. 21-1694-RGA

Dear Dr. Borody

As you are aware, Kirkland & Ellis LLP ("Kirkland & Ellis") represents Finch Therapeutics, Inc. ("Finch") in the above-referenced litigation.

As you also know, you have been subpoenaed to give testimony at a deposition and to provide documents in this case, and Kirkland & Ellis LLP has accepted service of such subpoena on your behalf at your consent. Finch has further agreed to provide you with legal representation for the limited purpose of preparing for and giving a deposition and producing documents in this litigation. Finch has agreed to provide such representation, at its cost, under the terms set forth in this letter.

As has been discussed with you by telephone, Kirkland & Ellis is not currently aware of any conflict of interest between you and Finch. However, in the event that a conflict of interest arises (or is later determined to exist) and Kirkland & Ellis determines in its sole discretion that it is unable to continue to represent you, Kirkland & Ellis reserves the right to resign from this limited representation. You hereby consent to such right of resignation by Kirkland & Ellis and agree that you will not assert any conflict of interest or other objection that would preclude Kirkland & Ellis from representing Finch or its affiliates in this current matter or any other

Austin Bay Area Beijing Boston Brussels Chicago Dallas Hong Kong Houston London Los Angeles Munich Paris Salt Lake City Shanghai Washington, D.C.

KIRKLAND & ELLIS LLP

Dr. Thomas J Borody
October 6, 2022
Page 2

matters, including adverse to you. To the extent that Kirkland & Ellis determines that it cannot continue the representation of you, you agree to seek separate legal counsel in such event.

Kirkland & Ellis acknowledges, and you agree, that there is a common interest as between you and Finch for purposes of responding to the subpoena and sitting for deposition in this action. As such, any privileged information or work product provided to you by Finch during the course of this representation is subject to a joint defense or common interest privilege such that the protections from discovery afforded to privileged information and work product are preserved and are not waived. You also agree that, although communications between you and Finch's counsel, Kirkland & Ellis (as well as communications between you and other attorneys retained by Finch to work on this litigation), may be privileged as attorney-client communications, such communications will not be confidential as between you and Finch. Therefore, Kirkland & Ellis may use such information obtained from you in connection with the representation of Finch regarding the matters contemplated by this letter, including adverse to you, and you hereby agree not to raise any objection to such use.

In addition, we want to be fair not only to you but also to our other clients. Because your current legal interests (and future legal interests) may differ from those of our other clients, it is possible that one of our other clients might at some time take a position contrary to yours in another matter in which we have been retained. If such a conflict of interest exists or arises in the future, you hereby agree to waive any such conflict of interest or other objection that would prevent our representation of another client in that matter. Specifically, our representation of you in connection with your deposition will be with the understanding that our work for you will not prevent us from continuing any current representation of another client or assuming any future representation in other matters that another client may request.

You have a right to obtain separate counsel to review independently the terms of this retention before you agree to those terms if you desire, and we have advised you of your right to retain separate counsel to represent you in response to the subpoena in this case.

If you agree to the joint representation as described herein, please confirm your agreement by signing this letter in the space provided below and returning it to us. If you accept our representation of you for purposes of this subpoena, our first step will be to contact plaintiffs' counsel to set a mutually convenient date for the deposition. Assuming that you agree to have us represent you, please tell anyone who attempts to contact you regarding the subpoena or this litigation that you are represented by counsel and refer such person(s) to me.

If you have any questions or concerns, please feel free to contact me.

KIRKLAND & ELLIS LLP

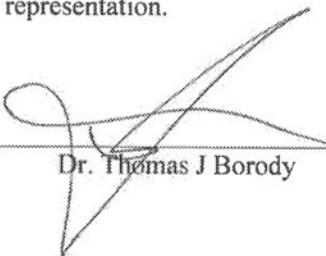
Dr. Thomas J Borody
October 6, 2022
Page 3

Sincerely,

/s/Patricia A. Carson

Patricia A. Carson

I have read this letter, and I understand and agree with the contents. I request Kirkland & Ellis LLP, on behalf of Finch, to represent me for the limited purpose of preparing for and defending any depositions and associated document requests arising out of the *Ferring Therapeutics Inc. and Rebiotix Inc. v. Finch Therapeutics et. al.*, C.A. No. 21-1694-RGA matter noted herein. I hereby waive my objection to any conflict of interest that Kirkland & Ellis LLP has or may have in this representation.



Dr. Thomas J Borody

Date: 11/10/2022

PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit D to Ferring/Rebiotix's Motion in Limine No. 5

Boots, Kimberly P.

From: Ross, Ashley <ashley.ross@kirkland.com>
Sent: Monday, January 30, 2023 9:48 PM
To: Bourke, Mary
Cc: Attaway, Daniel; Boots, Kimberly P.; Carson, Patricia A.; Afinogenova, Alina
Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--Borody documents and deposition

External (ashley.ross@kirkland.com)

[Report This Email](#) [FAQ](#)

Mary,

We had heard last week that [REDACTED] and had hoped to have an answer on when he would be available by the end of the week. However, [REDACTED], and that his trip in March may not go ahead. We will provide a further response when we have more information.

That said, we can confirm we will produce documents on a rolling basis.

Thanks

Ashley

Ashley Ross

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ashley.ross@kirkland.com

From: Bourke, Mary <Mary.Bourke@wbd-us.com>
Sent: Monday, January 30, 2023 4:11 PM
To: Carson, Patricia A. <patricia.carson@kirkland.com>
Cc: Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>; Ross, Ashley <ashley.ross@kirkland.com>; Afinogenova, Alina <alina.afinogenova@kirkland.com>
Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--Borody documents and deposition

Hi Pat

Any updates. You said you would be able to provide a date last week. Please let us know about the date and documents.

Mary

From: Bourke, Mary <Mary.Bourke@wbd-us.com>

Sent: Thursday, January 26, 2023 4:18 PM

To: Carson, Patricia A. <patricia.carson@kirkland.com>

Cc: Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>; Ross, Ashley <ashley.ross@kirkland.com>; Afinogenova, Alina <alina.afinogenova@kirkland.com>

Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--Borody documents and deposition

Thanks Pat. If you could let me know asap what date you would be producing Dr. Borody and where that would be helpful for planning.

Also I presume that you will not be withholding Dr. Borody's documents until two weeks before March 18 but will be producing them asap.

Please confirm

Mary

From: Carson, Patricia A. <patricia.carson@kirkland.com>

Sent: Wednesday, January 25, 2023 9:52 AM

To: Bourke, Mary <Mary.Bourke@wbd-us.com>

Cc: Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>; Ross, Ashley <ashley.ross@kirkland.com>; Afinogenova, Alina <alina.afinogenova@kirkland.com>

Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--Borody documents and deposition

Mary,

Thanks for your email. We can confirm that we will be providing at least the bulk of Dr. Borody's documents at least two weeks in advance of March 18 when the Malibu Microbiome Meeting is scheduled. We have reached out to Dr. Borody to obtain his preference for a date in that time frame and hope to be able to provide you with options later this week.

Thanks,

Pat

Patricia A. Carson

KIRKLAND & ELLIS LLP

601 Lexington Avenue, New York, NY 10022

T +1 212 446 6443 M +1 917 297 5954

patricia.carson@kirkland.com

From: Bourke, Mary <Mary.Bourke@wbd-us.com>

Sent: Tuesday, January 24, 2023 9:06 AM

To: Carson, Patricia A. <patricia.carson@kirkland.com>

Cc: Bourke, Mary <Mary.Bourke@wbd-us.com>; Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>

Subject: Ferring v. Finch, No. 21-cv-1694-RGA--Borody documents and deposition

Pat—

I wanted to follow up on our earlier conversation regarding the date for Dr. Borody's deposition. As I mentioned, our understanding is that Dr. Borody will be in California in mid-March for the Malibu Microbiome Conference, where he is listed as being a speaker. Provided that Dr. Borody's documents are produced at least two weeks in advance, we would be willing to schedule his deposition in Los Angeles, either before or after the conference, and would be willing to host the deposition at our offices in LA.

Could you please provide an update on your document production from Dr. Borody and his preference for a deposition date?

Kind regards,

Mary

Mary Bourke

Partner

Womble Bond Dickinson (US) LLP

d: 302-252-4333

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PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit E to Ferring/Rebiotix's Motion in Limine No. 5

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Ashley Cade
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Washington, D.C. 20004
United States
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Facsimile:
+1 202 389 5200

February 8, 2023

By E-mail

Daniel Attaway
Womble Bond Dickinson
1313 North Market Street
Suite 1200
Wilmington, DE 19801

CONFIDENTIAL

Re: *Ferring Pharmaceuticals Inc. et al v. Finch Therapeutics Group, Inc. et al*,
C.A. No. 21-cv-1694-RGA (D. Del.):

Dear Daniel:

I write in response to your February 7, 2023 letter regarding the parties ongoing discussions for depositions in this case.

First, we confirm we can accept a subpoena to Dr. Kieper on his behalf.

Second, we appreciate Rebiotix's willingness to discuss deposition locations other than in Delaware. We confirm Finch/UMN are willing to do the same.

Third, thank you for providing alternative time frames for Mr. Burgess and Mr. Smith's depositions. We are conferring with Mr. Burgess and will revert with an alternative date. Mr. Smith will be made available for deposition on April 4, 2023, at Kirkland's Boston office. Please confirm this date as soon as possible. Please also confirm the following deposition dates as soon as possible:¹

- Mr. Anderson: April 11, 2023, in Minneapolis;
- Mr. Straate: April 20, 2023, in Minneapolis;
- Dr. Weingarden: April 28, 2023, at Kirkland's Palo Alto office;

¹ Mr. Straate and Dr. Weingarden have extremely limited availability in April and May.

KIRKLAND & ELLIS LLP

Daniel Attaway
February 8, 2023
Page 2

- Dr. Hamilton: May 5, 2023, in Minneapolis; and
- Dr. Sadowsky: May 16, 2023, in Minneapolis.

We will provide a date for Dr. Khoruts in due course. When can we expect to receive proposed deposition dates from the persons that UMN/Finch have noticed for deposition?

Fourth, [REDACTED] We confirm he will not be at the Malibu Microbiome conference in mid-March. We remain willing to meet and confer with Rebiotix regarding the location of Dr. Borody's deposition once we have an update on his health status including, if necessary, proceeding with his deposition in Australia. Please explain why, given the extremely long flight, [REDACTED], Rebiotix is unwilling to agree to a remote deposition. To be clear, we will be in touch regarding a date and location for Dr. Borody's deposition once we have an update on his health status, including whether Dr. Borody will be able to travel internationally. We intend to bring Dr. Borody to trial [REDACTED], and he is able to travel internationally.

Finally, regarding Finch/UMN's notice of deposition to Ms. Kuphal, please confirm Rebiotix will not bring Ms. Kuphal to trial. Please also let us know if Rebiotix intends to identify another regulatory witness on their Rule 26 initial disclosures.

Regards,

/s/ Ashley Cade

Ashley Cade

cc: Counsel of Record

PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit F to Ferring/Rebiotix's Motion in Limine No. 5

Boots, Kimberly P.

From: Cade, Ashley <ashley.cade@kirkland.com>
Sent: Friday, March 10, 2023 10:53 AM
To: Bourke, Mary; Attaway, Daniel; Afinogenova, Alina; Alper, Adam R.; Parrado, Alvaro; Carson, Patricia A.; De Vries, Mike W.; *farnan@rlf.com; #Finch_Rebiotix; Schmidt, Leslie M.; Pedi, Nicole K.; Ross, Ashley
Cc: Boots, Kimberly P.; Bourke, Ben; Murphy, Zachary; Seifert, Kimberlynn; Severance, Dana; Davis, Joshua P.; rebyota
Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--depositions

External (ashley.cade@kirkland.com)

[Report This Email](#) [FAQ](#)

Daniel,

Thank you for providing the location for the depositions of Ferring's witnesses at the Westin Hotel in downtown Minneapolis. Further to your March 3 email, I can confirm that Finch/UMN will make their witnesses available at the W Minneapolis at the Foshay. Finch/UMN also confirm the dates/locations Ferring offered for Ms. Bancke, Mr. Green, Mr. Bell, and Ms. Wannenberger. Additionally, could you please let us know whether Mr. Berman will be made available at Womble's offices in New York or in Delaware?

Further to my March 6 email, Mr. Burgess is available for deposition on April 26 at Kirkland's office in Boston. Please let us know if this date and location works for Ferring.

I also write regarding your February 27 letter. First, Ferring offered the following counter-proposal regarding depositions of individuals where one party has stated it will not bring that witness to trial:

Ferring/Rebiotix will agree to the following for individuals listed on the parties initial disclosures: if a party listing an individual affirmatively represents that the party will not call that individual at trial and the party later decides to call the listed individual at trial, then the parties will negotiate in good faith to determine an appropriate date, time, and length of deposition for the individual, without good cause shown.

We agree, and further propose expanding this agreement beyond those witnesses listed on the parties' initial disclosures. This means that, to the extent either party affirmatively states it will not bring a noticed witness to trial, but later chooses to do so, the other party will have the opportunity to depose that witness, and the parties will negotiate in good faith to determine an appropriate date, time, and length of deposition for that individual, without good cause shown. Please let us know whether you are willing to agree to Finch/UMN's proposal. We are happy to confer, if helpful.

Finch/UMN also confirm that, absent a representation to the contrary for an absolute time limit on a deposition, the parties will operate with the understanding that the deposition time limits are for "on-the-record" time.

With respect to Dr. Borody, thank you for working with Finch/UMN to find a time and location that will work for Dr. Borody, given his health status. We are working with Dr. Borody to find time in May or June of this year, and will revert once we have a date. Can you please confirm Ferring will agree to take his deposition in Australia, or whether Ferring will proceed remotely?

Finally, Finch/UMN confirm that they do not intend to call the witnesses listed in your February 27 letter to trial. Finch/UMN reserve the right to revise this statement as the case progresses.

Thank you,
Ashley Cade

Ashley Cade

KIRKLAND & ELLIS LLP

1301 Pennsylvania Avenue, N.W., Washington, D.C. 20004

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F +1 202 389 5200

ashley.cade@kirkland.com

From: Bourke, Mary <Mary.Bourke@wbd-us.com>

Sent: Tuesday, March 7, 2023 9:35 AM

To: Cade, Ashley <ashley.cade@kirkland.com>; Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Afinogenova, Alina <alina.afinogenova@kirkland.com>; Alper, Adam R. <aalper@kirkland.com>; Parrado, Alvaro <alvaro.parrado@kirkland.com>; Carson, Patricia A. <patricia.carson@kirkland.com>; De Vries, Mike W. <michael.devries@kirkland.com>; *farnan@rlf.com <farnan@rlf.com>; #Finch_Rebiotix <Finch_Rebiotix@kirkland.com>; Schmidt, Leslie M. <leslie.schmidt@kirkland.com>; Pedi, Nicole K. <Pedi@rlf.com>; Ross, Ashley <ashley.ross@kirkland.com>

Cc: Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>; Bourke, Ben <Ben.Bourke@wbd-us.com>; Murphy, Zachary <Zachary.Murphy@wbd-us.com>; Seifert, Kimberlyn <Kimberlyn.Seifert@wbd-us.com>; Severance, Dana <Dana.Severance@wbd-us.com>; Davis, Joshua P. <Joshua.P.Davis@wbd-us.com>; rebyota <rebyota@wbd-us.com>

Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--depositions

Thanks Ashley for your response.

From: Cade, Ashley <ashley.cade@kirkland.com>

Sent: Tuesday, March 7, 2023 9:31 AM

To: Bourke, Mary <Mary.Bourke@wbd-us.com>; Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Afinogenova, Alina <alina.afinogenova@kirkland.com>; Alper, Adam R. <aalper@kirkland.com>; Parrado, Alvaro <alvaro.parrado@kirkland.com>; Carson, Patricia A. <patricia.carson@kirkland.com>; De Vries, Mike W. <michael.devries@kirkland.com>; *farnan@rlf.com <farnan@rlf.com>; #Finch_Rebiotix <Finch_Rebiotix@kirkland.com>; Schmidt, Leslie M. <leslie.schmidt@kirkland.com>; Pedi, Nicole K. <Pedi@rlf.com>; Ross, Ashley <ashley.ross@kirkland.com>

Cc: Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>; Bourke, Ben <Ben.Bourke@wbd-us.com>; Murphy, Zachary <Zachary.Murphy@wbd-us.com>; Seifert, Kimberlyn <Kimberlyn.Seifert@wbd-us.com>; Severance, Dana <Dana.Severance@wbd-us.com>; Davis, Joshua P. <Joshua.P.Davis@wbd-us.com>; rebyota <rebyota@wbd-us.com>

Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--depositions

Mary,

Thank you for your email. We apologize if our email of March 6 postponing Mr. Burgess's deposition scheduled for March 14 in Boston inconvenienced you or members of your team, particularly to the extent that travel arrangements may have already been made.

At the time we scheduled Mr. Burgess's deposition, Ferring had not served 30(b)(6) topics on Finch. Last week (on February 28), Ferring served 89 30(b)(6) topics on Finch, and three days later on March 3, asked that Finch identify the topics it would designate Mr. Burgess for by the following day, Saturday, March 4. Having reviewed the 89 topics and in consultation with our client, we determined that Finch will be designating Mr. Burgess to testify as to some of those topics, subject to any objections regarding scope etc. and as negotiated by the parties. To allow the parties sufficient time to confer so that Mr. Burgess can be properly prepared to testify, we believe that it is in both parties' interests to postpone his deposition.

We hope to provide a new date for Mr. Burgess soon, and we hope you will work with us to find a location that is convenient for Mr. Burgess.

Thank you,

Ashley

Ashley Cade

KIRKLAND & ELLIS LLP

1301 Pennsylvania Avenue, N.W., Washington, D.C. 20004

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F +1 202 389 5200

ashley.cade@kirkland.com

From: Bourke, Mary <Mary.Bourke@wbd-us.com>

Sent: Monday, March 6, 2023 9:16 PM

To: Cade, Ashley <ashley.cade@kirkland.com>; Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Afinogenova, Alina <alina.afinogenova@kirkland.com>; Alper, Adam R. <aalper@kirkland.com>; Parrado, Alvaro <alvaro.parrado@kirkland.com>; Carson, Patricia A. <patricia.carson@kirkland.com>; De Vries, Mike W. <michael.devries@kirkland.com>; *farnan@rlf.com <farnan@rlf.com>; #Finch_Rebiotix <Finch_Rebiotix@kirkland.com>; Schmidt, Leslie M. <leslie.schmidt@kirkland.com>; Pedi, Nicole K. <Pedi@rlf.com>; Ross, Ashley <ashley.ross@kirkland.com>

Cc: Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>; Bourke, Ben <Ben.Bourke@wbd-us.com>; Murphy, Zachary <Zachary.Murphy@wbd-us.com>; Seifert, Kimberlyn <Kimberlyn.Seifert@wbd-us.com>; Severance, Dana <Dana.Severance@wbd-us.com>; Davis, Joshua P. <Joshua.P.Davis@wbd-us.com>; rebyota <rebyota@wbd-us.com>

Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--depositions

Thank you Ashley . If that is the case Mr. Burgess must be produced in Delaware. We will follow up later with any reimbursement costs that must be paid by Finch for the late notice and cancellation.

Best regards

Mary

Mary Bourke

Partner

Womble Bond Dickinson (US) LLP

d: 302-252-4333
m: 610-212-6685
e: Mary.Bourke@wbd-us.com

1313 North Market Street
Suite 1200
Wilmington, DE 19801



womblebond Dickinson.com



From: Cade, Ashley <ashley.cade@kirkland.com>

Sent: Monday, March 6, 2023 3:50 PM

To: Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Afinogenova, Alina <alina.afinogenova@kirkland.com>; Alper, Adam R. <aalper@kirkland.com>; Parrado, Alvaro <alvaro.parrado@kirkland.com>; Carson, Patricia A. <patricia.carson@kirkland.com>; De Vries, Mike W. <michael.devries@kirkland.com>; *farnan@rlf.com <farnan@rlf.com>; #Finch_Rebiotix <Finch_Rebiotix@kirkland.com>; Schmidt, Leslie M. <leslie.schmidt@kirkland.com>; Pedi, Nicole K. <Pedi@rlf.com>; Ross, Ashley <ashley.ross@kirkland.com>

Cc: Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>; Bourke, Ben <Ben.Bourke@wbd-us.com>; Bourke, Mary <Mary.Bourke@wbd-us.com>; Murphy, Zachary <Zachary.Murphy@wbd-us.com>; Seifert, Kimberlynn <Kimberlynn.Seifert@wbd-us.com>; Severance, Dana <Dana.Severance@wbd-us.com>; Davis, Joshua P. <Joshua.P.Davis@wbd-us.com>; rebyota <rebyota@wbd-us.com>

Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--depositions

Daniel,

Finch intends to designate Mr. Burgess as a 30(b)(6) witness. We are postponing Mr. Burgess's deposition until after Finch has served its responses and objections to Ferring's 30(b)(6) notice that was served last week. We will follow-up with a new date in due course.

Regards,

Ashley

Ashley Cade

KIRKLAND & ELLIS LLP

1301 Pennsylvania Avenue, N.W., Washington, D.C. 20004

T +1 202 389 3381 M +1 202 957 9938

F +1 202 389 5200

ashley.cade@kirkland.com

From: Attaway, Daniel <Daniel.Attaway@wbd-us.com>

Sent: Monday, March 6, 2023 1:05 PM

To: Afinogenova, Alina <alina.afinogenova@kirkland.com>; Alper, Adam R. <aalper@kirkland.com>; Parrado, Alvaro <alvaro.parrado@kirkland.com>; Cade, Ashley <ashley.cade@kirkland.com>; Carson, Patricia A.

<patricia.carson@kirkland.com>; De Vries, Mike W. <michael.devries@kirkland.com>; *farnan@rlf.com
<farnan@rlf.com>; #Finch_Rebiotix <Finch_Rebiotix@kirkland.com>; Schmidt, Leslie M. <leslie.schmidt@kirkland.com>;
Pedi, Nicole K. <Pedi@rlf.com>; Ross, Ashley <ashley.ross@kirkland.com>
Cc: Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>; Bourke, Ben <Ben.Bourke@wbd-us.com>; Bourke, Mary
<Mary.Bourke@wbd-us.com>; Murphy, Zachary <Zachary.Murphy@wbd-us.com>; Seifert, Kimberllynn
<Kimberllynn.Seifert@wbd-us.com>; Severance, Dana <Dana.Severance@wbd-us.com>; Davis, Joshua P.
<Joshua.P.Davis@wbd-us.com>; rebyota <rebyota@wbd-us.com>

Subject: RE: Ferring v. Finch, No. 21-cv-1694-RGA--depositions

Counsel—

As a follow-up to the below, please confirm that Finch is not designating Mr. Burgess as a Rule 30(b)(6) witness.

Kind regards,

Daniel

Daniel Attaway

He/Him

Partner

Womble Bond Dickinson (US) LLP

d: 302-252-4365

m: 773-220-5764

e: Daniel.Attaway@wbd-us.com

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From: Attaway, Daniel

Sent: Friday, March 3, 2023 2:37 PM

To: 'Afinogenova, Alina' <alina.afinogenova@kirkland.com>; 'Alper, Adam R.' <adam.alper@kirkland.com>; 'Alvaro Parrado' <alvaro.parrado@kirkland.com>; 'Cade, Ashley' <ashley.cade@kirkland.com>; 'Carson, Patricia A.' <patricia.carson@kirkland.com>; 'De Vries, Michael W.' <michael.devries@kirkland.com>; 'Farnan, Kelly E.' <farnan@rlf.com>; 'Finch_Rebiotix@kirkland.com' <Finch_Rebiotix@kirkland.com>; 'Leslie M. Schmidt' <leslie.schmidt@kirkland.com>; 'Pedi, Nicole K.' <Pedi@rlf.com>; 'Ross, Ashley L.B.' <ashley.ross@kirkland.com>

Cc: Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Boots, Kimberly P. <Kimberly.Boots@wbd-us.com>;

Bourke, Ben <Ben.Bourke@wbd-us.com>; Bourke, Mary <Mary.Bourke@wbd-us.com>; Murphy, Zachary <Zachary.Murphy@wbd-us.com>; Seifert, Kimberlynn <Kimberlynn.Seifert@wbd-us.com>; Severance, Dana <Dana.Severance@wbd-us.com>; Davis, Joshua P. <Joshua.P.Davis@wbd-us.com>; rebyota <rebyota@wbd-us.com>

Subject: Ferring v. Finch, No. 21-cv-1694-RGA--depositions

Counsel,

We write regarding depositions in this case and specifically the notices of depositions for corporate witnesses.

Please confirm that Finch/UMN will provide any designations for Mr. Burgess no later than 5:00 pm tomorrow, 10 days before his scheduled deposition.

For Ferring/Rebiotix's witnesses in Minneapolis, we intend to make them available at the Westin hotel in downtown Minneapolis. Please confirm that Finch/UMN will make their witnesses in Minneapolis available at for deposition at the Foshay.

We expect to provide objections to Finch/UMN's Rule 30(b)(6) notice early next week, but in the interest of finalizing the deposition schedule, Ferring/Rebiotix identify the following additional witnesses who Ferring/Rebiotix intend to designate to provide corporate testimony, as well as dates and locations for their depositions:

Ms. Linde Bancke, who will be made available in Minneapolis on May 3, 2023.

Mr. Matt Green, who will be made available on May 17, 2023 at Womble's offices in Wilmington.

Mr. David Bell, who will be made available on May 19, 2023 at Womble's offices in Wilmington.

Ms. Kristin Wanneberger, who will be made available on May 24, 2023 at Womble's offices in Wilmington.

Please note that Ms. Wanneberger will be traveling from Europe for her deposition, so there is no flexibility in her deposition date.

Kind regards,

Daniel

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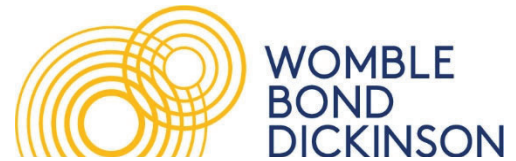
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PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit G to Ferring/Rebiotix's Motion in Limine No. 5

womblebonddickinson.com



March 14, 2023

Ashley Cade
Kirkland & Ellis LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Womble Bond Dickinson (US) LLP

1313 North Market Street
Suite 1200
Wilmington, DE 19801

t: 302.252.4320
f: 302.252.4330

Via Email PDF Attachment

Re: Ferring Pharmaceuticals Inc. et al. v. Finch Therapeutics Group, Inc., C.A. No. 21-cv-1694-RGA

Daniel Attaway
Partner
Direct Dial: 302-252-4365
Direct Fax: 302-661-7712
E-mail: Daniel.Attaway@wbd-us.com

Dear Ashley:

We write further to your March 10, 2023 email responding to various correspondence from us regarding depositions.

First, thank you for confirming the locations for Finch/UMN's witnesses in Minneapolis as well as confirming the dates/locations for the depositions of Ms. Bancke, Mr. Green, Mr. Bell, and Ms. Wannerberger.

We confirm that Mr. Berman will be made available for deposition in our Wilmington, Delaware offices. Please note that Mr. Berman has a hard stop at 3:45 pm. He has indicated that he is willing to begin the deposition as early as 7:00 am. Please let us know what time Finch/UMN would like to start the deposition.

With respect to Mr. Burgess, we are not available on April 26 for his deposition. With respect to Dr. Smith, we are amenable to postponing his deposition. We would request that Finch/UMN make both Mr. Burgess and Dr. Smith available for deposition in the first week of May in Boston on non-consecutive days.

With respect to your counter-proposal regarding depositions, we can agree to your proposed expansion of the agreement to including any noticed witness where the party seeking the deposition did not take the deposition based on a representation that the witness would not testify at trial.

Finally, with respect to Dr. Borody, thank you for the update. To the extent that Dr. Borody can travel to the U.S. for his deposition, our position is that he must do so. We are willing to take his deposition in California or Hawaii to minimize his travel time. To the extent that Dr. Borody is [REDACTED] to travel to the US, however, we will proceed with his deposition in-person in Australia. Given the various deadlines in the case, we request that he be made available the first week of June, 2023.



March 14, 2023
Page 2

Kind Regards,

Womble Bond Dickinson (US) LLP

A handwritten signature in black ink, appearing to read "Daniel M. Attaway", written over the printed name.

Daniel Attaway
Partner

cc: Counsel of Record

PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit H to Ferring/Rebiotix's Motion in Limine No. 5

Boots, Kimberly P.

From: Ross, Ashley <ashley.ross@kirkland.com>
Sent: Tuesday, April 4, 2023 11:33 PM
To: Attaway, Daniel
Cc: Boots, Kimberly P.; Bourke, Ben; Bourke, Mary; Murphy, Zachary; Seifert, Kimberlynn; Afinogenova, Alina; Alper, Adam R.; Parrado, Alvaro; Carson, Patricia A.; De Vries, Mike W.; *farnan@rlf.com; #Finch_Rebiotix; Schmidt, Leslie M.; Pedi, Nicole K.; Severance, Dana; Davis, Joshua P.; rebyota
Subject: Dr. Borody Deposition

External (ashley.ross@kirkland.com)

[Report This Email](#) [FAQ](#)

Daniel,

Dr. Borody will be available for deposition on June 6th in Sydney, Australia. Please confirm this date.

Thank you,

Ashley

Ashley Ross

KIRKLAND & ELLIS LLP

601 Lexington Avenue, New York, NY 10022

T +1 212 446 4954

F +1 212 446 4900

ashley.ross@kirkland.com

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PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit I to Ferring/Rebiotix's Motion in Limine No. 5

Boots, Kimberly P.

From: Severance, Dana
Sent: Sunday, May 21, 2023 9:52 AM
To: Boots, Kimberly P.
Subject: FW: MY DEPOSITION

Importance: High

Dana Severance

Partner
Womble Bond Dickinson (US) LLP

d: 302-252-4329
m: 302-563-1137
e: Dana.Severance@wbd-us.com

1313 North Market Street
Suite 1200
Wilmington, DE 19801



womblebond Dickinson.com



From: Thomas Borody <Thomas.Borody@cdd.com.au>
Sent: Saturday, May 20, 2023 8:22 PM
To: Bourke, Mary <Mary.Bourke@wbd-us.com>
Cc: Marcus Connor <marcus.connor@connorco.com.au>; Bourke, Ben <Ben.Bourke@wbd-us.com>; Severance, Dana <Dana.Severance@wbd-us.com>; Attaway, Daniel <Daniel.Attaway@wbd-us.com>; Murphy, Zachary <Zachary.Murphy@wbd-us.com>; ashley.ross@kirkland.com; patricia.carson@kirkland.com
Subject: MY DEPOSITION
Importance: High

Caution: External (thomas.borody@cdd.com.au)

First-Time Sender [Details](#)

[Report This Email](#) [FAQ](#)

Dear Mrs Bourke,

I hope this email finds you well.

I am contacting you as I understand from the [Justia website](#) that you act for Ferring Pharmaceuticals Inc and Rebiotix Inc in the litigation with Finch Therapeutics Inc and its related companies.

As you will be aware, I am due to give my deposition to your team next week at my offices in Sydney, Australia.

[REDACTED]

[REDACTED]

I apologise for the inconvenience caused to you and your team, as well as your clients.

I had my Australian attorney, Mr Marcus Connor, recently contact Mrs Ashley Ross of Kirkland & Ellis (who I understand is Finch's external counsel) with my request to reschedule the deposition.

As I've not heard back from them, I've decided to contact you directly given the urgency of this matter. I've done so as I appreciate that you and/or your staff may have made travel plans to Australia for the deposition next week.

I will ask my Australian attorney to liaise with Finch's external counsel and you about rescheduling my deposition.

But for now let's proceed on the basis the deposition will not occur next week.

I again apologise for any inconvenience caused to you and your team, as well as your clients.

Yours sincerely,

Kind Regards,

Dr Thomas Borody

MD PhD DSc FRACP FACF FACG AGAF FRSN

Director



e thomas.borody@cdd.com.au

p +61 2 9713 4011 | www.cdd.com.au

Level 1, 229 Great North Road, Five Dock NSW Australia 2046

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PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit J to Ferring/Rebiotix's Motion in Limine No. 5

To: Matthew Blischak[mblischak@finchtherapeutics.com]
Cc: Mark Smith[mark@finchtherapeutics.com], Thomas Borody[thomas.borody@cdd.com.au]
From: Marcus Connor[marcus.connor@connorco.com.au]
Sent: Thur 5/18/2023 12:08:52 PM (UTC)
Subject: Re: Marcus <--> Matt Introduction
20150507 Proposed FMT assignment.pdf

Matthew,

Thank you for your call earlier today.

So I would be grateful if you could please investigate this matter at your earliest convenience.

While Tom will co-operate with the requested deposition, clearly it will not assist Finch if he truthfully deposes matters which are contrary to its interests.

In my respectful view, the ownership of the intellectual property related to FMT is likely to be an important matter in your litigation. As a separate matter, it might also be an important matter to Finch if there are material misstatements in its prospectus and shareholder announcements, as well as audited accounts.

I raise those matters not to antagonise you but to rather demonstrate the issue needs to be properly investigated and considered.

That, of course, requires time and the assistance of your external counsel. Given the deposition is next week, it is not ideal to resolve that issue within a matter of days. I instead suggest the deposition be delayed for a few weeks while we work through it. That would be ideal as the amount to be reimbursed to Tom will be an important issue if Tom's views are found to be correct.

If you disagree with my view and require Tom to submit to the deposition next week, then he will do so.

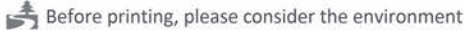
If you agree with my view that more time is required before Tom submits to the deposition,

We appreciate that depositions are serious matters and are not to be taken lightly. We also appreciate that respect needs to be shown to the Court and your opponent. Yet realistically no deposition can occur while Tom is seriously ill.

I look forward to hearing from you at your earliest convenience.

Regards,
Marcus

Marcus Connor | Legal Practitioner Director | **Connor & Co Lawyers**
P: +612 9299 6696 | M: +61 405 130 797 | <https://connorco.com.au/> | [My LinkedIn profile](#)



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From: Mark Smith <mark@finchtherapeutics.com>

Sent: Thursday, May 18, 2023 10:23 AM

To: Marcus Connor <marcus.connor@connorco.com.au>; Thomas Borody <Thomas.Borody@cdd.com.au>

Cc: Marcus_Connor@yahoo.com.au; Matthew Blischak <mblischak@finchtherapeutics.com>

Subject: Re: Marcus <--> Matt Introduction

Good to hear from you Markus, I think Matt is separately trying to coordinate times with you on a parallel thread. In the event you two aren't able to connect tonight, let him know if there are windows that would work in our morning/your evening or our evening/your morning and I'll let him follow-up with you to confirm timing and pick up the conversation.

All the best,

Mark

From: Marcus Connor <marcus.connor@connorco.com.au>

Date: Wednesday, May 17, 2023 at 6:46 PM

To: Thomas Borody <Thomas.Borody@cdd.com.au>, Mark Smith <mark@finchtherapeutics.com>

Cc: Marcus_Connor@yahoo.com.au <Marcus_Connor@yahoo.com.au>, Matthew Blischak <mblischak@finchtherapeutics.com>

Subject: RE: Marcus <--> Matt Introduction

Hi Mark,

Please let me know when you would like to talk.

Regards,

Marcus

Marcus Connor | Legal Practitioner Director | **Connor & Co Lawyers**

P: +612 9299 6696 | M: +61 405 130 797 | <https://connorco.com.au/> | [My LinkedIn profile](#)

Level 5, 50 Margaret Street, Sydney NSW 2000

GPO Box 1807, Sydney NSW 2000



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From: Thomas Borody <Thomas.Borody@cdd.com.au>

Sent: Thursday, May 18, 2023 8:42 AM

To: Mark Smith <mark@finchtherapeutics.com>; Marcus Connor <marcus.connor@connorco.com.au>

Cc: Marcus_Connor@yahoo.com.au; Matthew Blischak <mblischak@finchtherapeutics.com>

Subject: Re: Marcus <--> Matt Introduction

Kind regards,

Dr Thomas J Borody
MD PhD DSc FRACP FACP FACG AGAF FRSN
Director
Centre for Digestive Diseases
Lvl 1, 229 Great North Road
Five Dock NSW 2046
Australia
Ph: 61 2 9713 4011
Fax: 61 2 9712 1675
www.cdd.com.au

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On 18 May 2023, at 8:31 am, Mark Smith <mark@finchtherapeutics.com> wrote:

Dear Marcus,

I spoke with Dr. Borody (cc-ed) and he indicated that he would like me to connect you with Matt Blischack, Finch's CEO (also cc-ed). I tried your c-legal.com.au address earlier but had a bounce so trying your yahoo address here. Tom, let me know if there is a better way to reach Marcus. Matt may also try his cell phone directly.

All the best,

Mark

PROPOSED PRETRIAL ORDER

EXHIBIT 18-5

Exhibit K to Ferring/Rebiotix's Motion in Limine No. 5

To: Matthew Blischak[mblischak@finchtherapeutics.com]
Cc: Mark Smith[mark@finchtherapeutics.com]; Thomas.Borody@cdd.com.au[Thomas.Borody@cdd.com.au]
From: Marcus Connor[marcus.connor@connorco.com.au]
Sent: Fri 5/19/2023 11:17:29 AM (UTC)
Subject: Re: Marcus <--> Matt Introduction

Matthew,

Tom and I spoke briefly with Mark this morning (our time).

Mark mentioned that your external counsel, Kirkland & Ellis, may call us with you this weekend.

Please let us know if that is your intention and when such a call might occur.

Regards,
Marcus


Get [Outlook for iOS](#)

From: Marcus Connor
Sent: Friday, May 19, 2023 8:26:25 AM
To: mblischak@finchtherapeutics.com <mblischak@finchtherapeutics.com>
Cc: mark@finchtherapeutics.com <mark@finchtherapeutics.com>; Thomas.Borody@cdd.com.au <Thomas.Borody@cdd.com.au>
Subject: RE: Marcus <--> Matt Introduction

Matthew,

Can you please let us know if Tom should reschedule the deposition.

Regards,
Marcus

Marcus Connor | Legal Practitioner Director | **Connor & Co Lawyers**
P: +612 9299 6696 | M: +61 405 130 797 | <https://connorco.com.au/> | [My LinkedIn profile](#)
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From: Marcus Connor
Sent: Thursday, May 18, 2023 10:09 PM
To: mblischak@finchtherapeutics.com
Cc: mark@finchtherapeutics.com; Thomas.Borody@cdd.com.au
Subject: Re: Marcus <--> Matt Introduction

Matthew,

Thank you for your call earlier today.

As discussed, Tom has instructed me that:

So I would be grateful if you could please investigate this matter at your earliest convenience.

While Tom will co-operate with the requested deposition, clearly it will not assist Finch if he truthfully deposes matters which are contrary to its interests.

In my respectful view, the ownership of the intellectual property related to FMT is likely to be an important matter in your litigation. As a separate matter, it might also be an important matter to Finch if there are material misstatements in its prospectus and shareholder announcements, as well as audited accounts.

I raise those matters not to antagonise you but to rather demonstrate the issue needs to be properly investigated and considered.

That, of course, requires time and the assistance of your external counsel. Given the deposition is next week, it is not ideal to resolve that issue within a matter of days. I instead suggest the deposition be delayed for a few weeks while we work through it. That would be ideal as the amount to be reimbursed to Tom will be an important issue if Tom's views are found to be correct.

If you disagree with my view and require Tom to submit to the deposition next week, then he will do so.


If you agree with my view that more time is required before Tom submits to the deposition,

We appreciate that depositions are serious matters and are not to be taken lightly. We also appreciate that respect needs to be shown to the Court and your opponent. Yet realistically no deposition can occur while Tom is seriously ill.

I look forward to hearing from you at your earliest convenience.

Regards,
Marcus

Marcus Connor | Legal Practitioner Director | **Connor & Co Lawyers**
P: +612 9299 6696 | M: +61 405 130 797 | <https://connorco.com.au/> | [My LinkedIn profile](#)
Level 5, 50 Margaret Street, Sydney NSW 2000
GPO Box 1807, Sydney NSW 2000

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From: Mark Smith <mark@finchtherapeutics.com>

Sent: Thursday, May 18, 2023 10:23 AM

To: Marcus Connor <marcus.connor@connorco.com.au>; Thomas Borody <Thomas.Borody@cdd.com.au>

Cc: Marcus_Connor@yahoo.com.au; Matthew Blischak <mblischak@finchtherapeutics.com>

Subject: Re: Marcus <--> Matt Introduction

Good to hear from you Markus, I think Matt is separately trying to coordinate times with you on a parallel thread. In the event you two aren't able to connect tonight, let him know if there are windows that would work in our morning/your evening or our evening/your morning and I'll let him follow-up with you to confirm timing and pick up the conversation.

All the best,

Mark

From: Marcus Connor <marcus.connor@connorco.com.au>

Date: Wednesday, May 17, 2023 at 6:46 PM

To: Thomas Borody <Thomas.Borody@cdd.com.au>, Mark Smith <mark@finchtherapeutics.com>

Cc: Marcus_Connor@yahoo.com.au <Marcus_Connor@yahoo.com.au>, Matthew Blischak

<mblischak@finchtherapeutics.com>

Subject: RE: Marcus <--> Matt Introduction

Hi Mark,

Please let me know when you would like to talk.

Regards,


Marcus

Marcus Connor | Legal Practitioner Director | **Connor & Co Lawyers**

P: +612 9299 6696 | M: +61 405 130 797 | <https://connorco.com.au/> | [My LinkedIn profile](#)

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GPO Box 1807, Sydney NSW 2000

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From: Thomas Borody <Thomas.Borody@cdd.com.au>

Sent: Thursday, May 18, 2023 8:42 AM

To: Mark Smith <mark@finchtherapeutics.com>; Marcus Connor <marcus.connor@connorco.com.au>

Cc: Marcus_Connor@yahoo.com.au; Matthew Blischak <mblischak@finchtherapeutics.com>

Subject: Re: Marcus <--> Matt Introduction

Kind regards,

Dr Thomas J Borody

MD PhD DSc FRACP FACP FACG AGAF FRSN

Director

Centre for Digestive Diseases

Australia

Ph: 61 2 9713 4011

Fax: 61 2 9712 1675

www.cdd.com.au

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On 18 May 2023, at 8:31 am, Mark Smith <mark@finchtherapeutics.com> wrote:

Dear Marcus,

I spoke with Dr. Borody (cc-ed) and he indicated that he would like me to connect you with Matt Blischack, Finch's CEO (also cc-ed). I tried your c-legal.com.au address earlier but had a bounce so trying your yahoo address here. Tom, let me know if there is a better way to reach Marcus. Matt may also try his cell phone directly.

All the best,

Mark

PROPOSED PRETRIAL ORDER

EXHIBIT 18.5

**UMN/FINCH'S OPPOSITION TO FERRING/REBIOTIX'S
MOTION *IN LIMINE* NO. 5 FOR ADVERSE INFERENCE**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

_____)	
FERRING PHARMACEUTICALS INC.,)	
REBIOTIX INC.)	
)	
Plaintiffs,)	
)	
v.)	
)	
FINCH THERAPEUTICS GROUP, INC.,)	
FINCH THERAPEUTICS, INC., and FINCH)	
THERAPEUTICS HOLDINGS, LLC.)	C.A. No. 21-1694-JLH
)	
Defendants.)	FILED UNDER SEAL
_____)	
)	
FINCH THERAPEUTICS GROUP, INC.,)	
FINCH THERAPEUTICS, INC., FINCH)	
THERAPEUTICS HOLDINGS, LLC, and)	
REGENTS OF THE UNIVERSITY OF)	
MINNESOTA)	
)	
Counterclaim-Plaintiffs/Reply Defendants,)	
)	
v.)	
)	
FERRING PHARMACEUTICALS INC., and)	
REBIOTIX, INC.)	
)	
Counterclaim-Defendants/Reply Plaintiffs.)	
_____)	

**UMN/FINCH’S OPPOSITION TO FERRING/REBIOTIX’S
MOTION *IN LIMINE* NO. 5 FOR ADVERSE INFERENCE**

Ferring's motion for evidentiary sanctions has no merit and should be denied. Ferring seeks an adverse inference instruction that Dr. Borody's testimony (had Ferring deposed him) would have been unhelpful to Finch. In making this request, Ferring grossly mischaracterizes the facts and baselessly accuses Finch of "misconduct." Finch, however, has been transparent with Ferring and the Court regarding interactions between its counsel ("K&E") and Dr. Borody, including K&E's withdrawal from representing Dr. Borody after he demanded [REDACTED] [REDACTED] to sit for a deposition. Ferring, by contrast, has not. Weeks ago, Ferring produced a tranche of documents that it obtained from Dr. Borody. Ferring would not say how or when it obtained the documents, or what contact it has had with Dr. Borody. Nor has Ferring, who has listed Dr. Borody as "may call," indicated whether it will be bringing Dr. Borody to trial. There is no reason for any adverse inference against Finch on these facts.

While courts possess inherent power to control litigation, in deciding whether to impose an adverse inference sanction (like Ferring requests), courts consider: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party." *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994). None of those requirements are met. Indeed, Ferring cites no case sanctioning a party (Finch) for the conduct of a non-party it does not control (Borody).¹

First, Finch is not at fault, and no evidence was altered or destroyed. Ferring's contrary narrative omits critical facts that it is well aware of. In 2022, K&E agreed to represent Dr. Borody to respond to Ferring's subpoena and worked with him to produce over 4,000 documents. Ex. 18-5, Ex. C. Despite Dr. Borody's significant health issues, which K&E apprised

¹ Ferring also cites Rule 37(b), but that requires violation of a Court order. There was no order for Dr. Borody's deposition, and none was violated.

Ferring of (Ex. 18-5, Ex. E), K&E secured June 6, 2023 for Dr. Borody's deposition (Ex. 18-5, Exs. D, G, I). But on May 12, 2023, Dr. Borody chose to delay his deposition (Ex. A), and his Australian counsel then stepped in and relayed, for the first time, Dr. Borody's claim that he was never paid for his patents. Australian counsel said Dr. Borody would "co-operate with the requested deposition" but threatened (while asking for a large payment) that "clearly it will not assist Finch if he truthfully deposes matters which are contrary to [Finch's] interests." Ex. 18-5, Ex. J. Days later, Dr. Borody wrote to Ferring's counsel, without copying K&E, stating that he

[REDACTED]. Ex. 18-5, Ex. I. Then, on June 2, 2023, [REDACTED]

[REDACTED]

[REDACTED] Ex. B (6/2/2023 invoice and email). K&E promptly responded, stating:

[T]o the extent you are suggesting that some form of payment must be made to you in order for you to proceed with your deposition in the Ferring litigation or for you to provide any particular testimony . . . (a suggestion you have not made to our Firm at any prior time), such a request is improper and we reject it.

Ex. C (6/5/2023 P. Carson letter). K&E immediately withdrew from representing Dr. Borody but "strongly urge[d]" him to sit for deposition. *Id.* K&E also notified Ferring and agreed to "work with Ferring to make [Dr. Borody's deposition] happen." Ex. 17.5, Ex. 2. Finch's counsel repeated Finch's willingness to cooperate at a July 2023 hearing. Ex. D at 19:9-20:20. Ferring never took Finch up on these offers. Thus, there is no evidence that Finch (or K&E) did anything to prevent Dr. Borody's deposition and Ferring is not entitled to an adverse inference. *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (requiring "actual suppression or withholding of the evidence"); FRCP 37(e)(2) (adverse inference requires "intent to deprive").

Second, Ferring has suffered no prejudice. Ferring made no effort to depose Dr. Borody after K&E withdrew as his counsel (despite having further contact with him). While Ferring claims Dr. Borody would have provided "key testimony" on standing, Ferring does not say what

that testimony would be. Ferring also moved for dismissal without it, and told the Court it was “not relying on” Dr. Borody’s assertions in his letters on ownership, Ex. D at 35:7–19. Ferring has also included Dr. Borody on its may call list. Ferring’s delay in raising this issue undermines any alleged prejudice: Ferring could have cured any prejudice by pursuing Dr. Borody’s deposition, *e.g.*, through letters rogatory (with which Finch offered to assist). Indeed, Ferring has been in contact with and obtained documents from Dr. Borody in the past year but chose not to try and proceed with deposing him. Any prejudice is “a problem of its own making.” *Cf. Evolved Wireless, LLC v. Apple Inc.*, 2019 WL 8128549, at *1 (D. Del. Feb. 14, 2019).

Third, there is no reason for any sanction in these circumstances, especially because “[a]n adverse inference is an extreme remedy” that will impose substantial unfairness on Finch due to the actions of a third party who is not within its control and who demanded payment for his testimony. *Robinson v. Beckles*, 2019 WL 2453776, at *2 (D. Del. June 12, 2019). Ferring does not cite a single case imposing any sort of sanction, let alone an adverse inference, on these facts. Ferring relies heavily on *Victaulic Co. v. HiTHERM, LLC*, 2024 WL 1364258 (E.D. Pa. Mar. 28, 2024), but in that case, the court issued sanctions after a party-controlled witness no-showed a *court ordered* deposition.² *Id.* at *1–3. Similarly, in *Chase Home Fin. LLC v. Maalouf*, 2009 WL 10701991, at *4 (D. Md. Mar. 25, 2009), and *De Saro v. United States*, 305 F. Supp. 2d 1330, 1333 (S.D. Fla. 2004), *parties* to the case refused to participate in discovery. That is not what happened here. *Supra*. Simply put, “[a]n adverse inference instruction would be unfair where,” as here, the complained-of conduct is due to a third-party’s actions. *Stern v. Shammass*, 2015 WL 4530473, at *14 (E.D.N.Y. July 27, 2015). Ferring’s motion should be denied.

² *C.B. v. Moreno Valley Unified Sch. Dist.*, 2023 WL 6782320, at *9 (C.D. Cal. Sept. 18, 2023), and *SEC v. Hong*, 2021 WL 4923310, at *1 (C.D. Cal. Oct. 21, 2021), also deal with violations of court orders.

EXHIBIT A

From: [Thomas Borody](#)
To: [Ross, Ashley](#)
Cc: [Margaux Alvaran](#); [Vic Dawson](#); [Parrado, Alvaro](#)
Subject: Re: Finch Deposition Logistics
Date: Friday, May 12, 2023 10:06:11 PM

This message is from an EXTERNAL SENDER
Be cautious, particularly with links and attachments.

Largely contingent on one issue, which I cannot mention at the stage. I'll be starting some dialogue with the Finch people about this.

Kind regards,

Dr Thomas J Borody
MD PhD DSc FRACP FACP FACG AGAF FRSN
Director
Centre for Digestive Diseases
Lvl 1, [229 Great North Road](#)
[Five Dock NSW 2046](#)
[Australia](#)
Ph: [61 2 9713 4011](#)
Fax: [61 2 9712 1675](#)
[www.cdd.com.au](#)

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On 13 May 2023, at 12:02 pm, Ross, Ashley <ashley.ross@kirkland.com> wrote:

Hi Dr. Borody,

We hope everything is alright - is there anything we can do on our end to help matters along to try to keep the June date?

Thank you,

Ashley

Ashley Ross

KIRKLAND & ELLIS LLP

601 Lexington Avenue, New York, NY 10022

T +1 212 446 4954

F +1 212 446 4900

ashley.ross@kirkland.com

On May 12, 2023, at 9:53 PM, Thomas Borody
<Thomas.Borody@cdd.com.au> wrote:

Ashley

I am delaying.

Tom

Kind regards,

Dr Thomas J Borody
MD PhD DSc FRACP FACP FACG AGAF FRSN
Director
Centre for Digestive Diseases
Lvl 1, [229 Great North Road](#)
[Five Dock NSW 2046](#)
[Australia](#)
Ph: [61 2 9713 4011](tel:61297134011)
Fax: [61 2 9712 1675](tel:61297121675)
www.cdd.com.au

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On 13 May 2023, at 11:41 am, Ross, Ashley
<ashley.ross@kirkland.com> wrote:

Hi Margaux,

We have not heard that there will be any delay, on our end, so if you could please keep everything on calendar

we would appreciate it. We will also take you up on Wednesday at 10 AM Sydney time if that's ok.

Thanks

Ashley Ross

KIRKLAND & ELLIS LLP

[601 Lexington Avenue, New York, NY 10022](#)

T [+1 212 446 4954](#)

F [+1 212 446 4900](#)

ashley.ross@kirkland.com

On May 12, 2023, at 7:51 PM, Margaux Alvaran <Margaux.Alvaran@cdd.com.au> wrote:

Hi Ashley

I've just received word that deposition may be delayed or suspended until we hear word from Finch, we will wait at this stage
Thanks

Yours kindly

Margaux Alvaran
Interim Research Manager
Mondays - Wednesdays - Fridays

From: Margaux Alvaran

<Margaux.Alvaran@cdd.com.au>

Sent: Saturday, May 13, 2023 9:43:25 AM

To: Ross, Ashley <ashley.ross@kirkland.com>;
Thomas Borody

<Thomas.Borody@cdd.com.au>

Cc: Vic Dawson <Vic.Dawson@cdd.com.au>;
Parrado, Alvaro

<alvaro.parrado@kirkland.com>

Subject: Re: Finch Deposition Logistics

Hi Ashley

Would Wednesday 17th at 10am Sydney time work better for you ?

Yours kindly

Margaux Alvaran
Interim Research Manager
Mondays - Wednesdays - Fridays

From: Ross, Ashley
<ashley.ross@kirkland.com>
Sent: Saturday, May 13, 2023 9:34:49 AM
To: Margaux Alvaran
<Margaux.Alvaran@cdd.com.au>; Thomas
Borody <Thomas.Borody@cdd.com.au>
Cc: Vic Dawson <Vic.Dawson@cdd.com.au>;
Parrado, Alvaro
<alvaro.parrado@kirkland.com>
Subject: RE: Finch Deposition Logistics

Thanks Margaux - could we do 11 am Sydney
time instead?

Thanks again,

Ashley

Ashley Ross

KIRKLAND & ELLIS LLP
601 Lexington Avenue, New York, NY 10022
T +1 212 446 4954
F +1 212 446 4900

ashley.ross@kirkland.com

From: Margaux Alvaran
<Margaux.Alvaran@cdd.com.au>
Sent: Friday, May 12, 2023 7:02 PM
To: Ross, Ashley <ashley.ross@kirkland.com>;
Thomas Borody
<Thomas.Borody@cdd.com.au>
Cc: Vic Dawson <Vic.Dawson@cdd.com.au>;
Parrado, Alvaro
<alvaro.parrado@kirkland.com>
Subject: Re: Finch Deposition Logistics

Hi Ashley would 9am Monday 15th May Sydney
time be suitable for you guys ?

Yours kindly
Margaux Alvaran

Interim Research Manager
Mondays - Wednesdays - Fridays

From: Ross, Ashley
<ashley.ross@kirkland.com>
Sent: Saturday, May 13, 2023 12:46:23 AM
To: Thomas Borody
<Thomas.Borody@cdd.com.au>
Cc: Margaux Alvaran
<Margaux.Alvaran@cdd.com.au>; Vic Dawson
<Vic.Dawson@cdd.com.au>; Parrado, Alvaro
<alvaro.parrado@kirkland.com>
Subject: RE: Finch Deposition Logistics

Thank you Dr. Borody- Margaux, we will follow your lead on what times might work best from Dr. Borody's schedule.

Thank you,

Ash

Ashley Ross

KIRKLAND & ELLIS LLP
601 Lexington Avenue, New York, NY 10022
T +1 212 446 4954
F +1 212 446 4900

ashley.ross@kirkland.com

From: Thomas Borody
<Thomas.Borody@cdd.com.au>
Sent: Friday, May 12, 2023 10:45 AM
To: Ross, Ashley <ashley.ross@kirkland.com>
Cc: Margaux Alvaran
<Margaux.Alvaran@cdd.com.au>; Vic Dawson
<Vic.Dawson@cdd.com.au>; Parrado, Alvaro
<alvaro.parrado@kirkland.com>
Subject: Re: Finch Deposition Logistics

I'm ok with that

Kind regards,

10022

T +1 212 446 4954

F +1 212 446 4900

ashley.ross@kirkland.com

From: Ross, Ashley

Sent: Wednesday, May 10, 2023

5:33 PM

To: 'Thomas Borody'

<Thomas.Borody@cdd.com.au>

Cc: Margaux Alvaran

<Margaux.Alvaran@cdd.com.au>;

Vic Dawson

<Vic.Dawson@cdd.com.au>;

Parrado, Alvaro

<alvaro.parrado@kirkland.com>

Subject: RE: Finch Deposition

Logistics

Absolutely, in general the question is what's the invention story behind these patents in particular? More specific questions are as follows, but no need to respond via email on these, we can discuss on the call:

1. How did you determine the importance of / viability of adding a cryoprotectant?
Of adding an antioxidant?
2. Some of your claims talk about PEG as a cryoprotectant in particular - had you tried using PEG as a cryoprotectant in the stool compositions you were using back in the 2010s?
3. How did you come up with the idea of a stool bank? Or transporting the stool to a remote facility?
4. What is meant by "rough

particulate matter” and
how did you come up with
the notion that separating
the microbiota from the
rough particulate matter?

5. At least one claim talks
about using 50 g of donor
stool in particular - where
did that come from?

Thank you,

Ashley

I am attaching the patents here as
well.

Thank you,

Ash

Ashley Ross

KIRKLAND & ELLIS LLP

601 Lexington Avenue, New York, NY
10022

T +1 212 446 4954

F +1 212 446 4900

ashley.ross@kirkland.com

From: Thomas Borody

<Thomas.Borody@cdd.com.au>

Sent: Wednesday, May 10, 2023

5:12 PM

To: Ross, Ashley

<ashley.ross@kirkland.com>

Cc: Margaux Alvaran

<Margaux.Alvaran@cdd.com.au>;

Vic Dawson

<Vic.Dawson@cdd.com.au>;

Parrado, Alvaro

<alvaro.parrado@kirkland.com>

Subject: Re: Finch Deposition

Logistics

I think that's possible and
Margaux will arrange

Can you send any questions/info
ahead and list of the patents ? (I
have > 200 patents ; applications)

Thx

Kind regards,

Dr Thomas J Borody
MD PhD DSc FRACP FACP FACG
AGAF FRSN
Director
Centre for Digestive Diseases
Lvl 1, [229 Great North Road](#)
[Five Dock NSW 2046](#)
[Australia](#)
Ph: [61 2 9713 4011](#)
Fax: [61 2 9712 1675](#)
[www.cdd.com.au](#)

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sender immediately by return e-
mail and delete this message from
any computer.

From: Parrado,
Alvaro
<alvaro.parrado@kirkland.com>

Sent: Tuesday, May
2, 2023 10:25 AM
To: Margaux Alvaran
<Margaux.Alvaran@cdd.com.au>; Vic
Dawson
<Vic.Dawson@cdd.com.au>; Thomas
Borody
<Thomas.Borody@cdd.com.au>
Cc: Ross, Ashley
<ashley.ross@kirkland.com>; Lominac,
Anita
<alominac@kirkland.com>
Subject: RE: Finch
Deposition Logistics

Thank you for that
information we will
look into alternative
locations.

Alvaro R. Parrado

Senior Paralegal |
Intellectual Property

KIRKLAND & ELLIS LLP

601 Lexington Avenue,
New York, NY 10022
T +1 212 909 3407 **M** +1
212-960-8542
F +1 212 446 4900

alvaro.parrado@kirkland.com

From: Margaux
Alvaran
<Margaux.Alvaran@cdd.com.au>

cdd.com.au>

Sent: Monday, May
1, 2023 10:39 PM

To: Parrado, Alvaro
<alvaro.parrado@kirkland.com>; Vic

Dawson
<Vic.Dawson@cdd.com.au>; Thomas
Borody
<Thomas.Borody@cdd.com.au>

Cc: Ross, Ashley
<ashley.ross@kirkland.com>; Lominac,
Anita
<alominac@kirkland.com>

Subject: Re: Finch
Deposition Logistics

Dear Alvaro
Thank you for your
email and I hope you
are well.

[REDACTED]
[REDACTED]
[REDACTED] may I

suggest somewhere
closer ? There are
meeting rooms at
Five Dock RSL that
you may be able to
utilise? As the
deposition would
likely take a full day,

[REDACTED]
[REDACTED]
[REDACTED] having a

location in the Five
Dock area might be
better for him.

Thanks

Yours kindly

Margaux

Alvaran

Interim Research
Manager

Mondays-
Wednesdays-Fridays

From: Parrado,
Alvaro

<alvaro.parrado@kirkland.com>

Date: Tuesday, 2
May 2023 at 10:18
am

To: Margaux

Alvaran

<Margaux.Alvaran@cdd.com.au>, Vic

Dawson

<Vic.Dawson@cdd.com.au>, Thomas

Borody

<Thomas.Borody@cdd.com.au>

Cc: Ross, Ashley

<ashley.ross@kirkland.com>, Lominac,

Anita

<alominac@kirkland.com>

Subject: Finch

Deposition Logistics

Hello Margaux, Vic
and Dr. Borody,

I am writing
regarding logistics
for Dr. Borody's
upcoming June
deposition. We are

finalizing logistics on our end but the current plan is to meet at CDD's offices on June 5 to prepare, and then conduct the actual deposition on June 6th at the offices of King & Wood Mallesons at 1 Farrer Place, Sydney NSW 2000. If that location does not work, please let us know if you have an alternative location such as a hotel where you would prefer for it to take place.

Thank you,

Alvaro R. Parrado

Senior Paralegal |
Intellectual Property

KIRKLAND & ELLIS LLP

601 Lexington Avenue,
New York, NY 10022

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212-960-8542

F +1 212 446 4900

alvaro.parrado@kirkland.com

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EXHIBIT 18-5 OPPOSITION

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EXHIBIT B

From: [Thomas Borody](#)
To: [Ross, Ashley](#); [Carson, Patricia A.](#); [De Vries, Mike W.](#); [Alper, Adam R.](#)
Cc: [Mark Smith](#)
Subject: FW: Rebiotix v. Finch Deposition
Date: Monday, June 5, 2023 5:03:00 AM
Attachments: [image001.png](#)
[image002.png](#)
[20230602 Invoice \(002\)-signed.pdf](#)
Importance: High

This message is from an EXTERNAL SENDER
Be cautious, particularly with links and attachments.

Dear Ashley,

I enclose my invoice as described below.

Kind Regards,

Dr Thomas Borody
MD PhD DSc FRACP FACP FACG AGAF FRSN
Director

Email Signature


e thomas.borody@cdd.com.au
p +61 2 9713 4011 | www.cdd.com.au
Level 1, 229 Great North Road, Five Dock NSW Australia 2046

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Dear Ashley,

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Kind Regards,

Dr Thomas Borody

MD PhD DSc FRACP FACP FACG AGAF FRSN

Director



e thomas.borody@cdd.com.au

p +61 2 9713 4011 | www.cdd.com.au

Level 1, 229 Great North Road, Five Dock NSW Australia 2046

<image001.png>

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From: "Ross, Ashley" <ashley.ross@kirkland.com>

Date: 30 May 2023 at 11:30:40 pm AEST

To: Thomas Borody <thomas.borody@cdd.com.au>

Cc: "Carson, Patricia A." <patricia.carson@kirkland.com>, "De Vries, Mike W." <michael.devries@kirkland.com>, "Alper, Adam R." <aalper@kirkland.com>

Subject: Rebiotix v. Finch Deposition

Hi Dr. Borody,

We saw your email over to Mary Bourke and her response back to you, and understand from that exchange that Rebiotix has agreed to postpone the deposition given [REDACTED]

We also hope you are doing alright in that regard.

We had recently reached out to you as your retained counsel in connection with your response to certain discovery requests in the Rebiotix litigation (pursuant to our engagement letter with you, attached), with the hope of discussing your deposition. We are not sure we are fully following the import of the correspondence that Marcus sent us in response, including how if at all it is intended to relate to patents-in-suit in the Rebiotix litigation. Additionally, Rebiotix has indicated that it still wants to take your deposition [REDACTED]. We therefore are hoping to set up a call with you (and, if you would like, your other counsel) to better understand any questions or concerns you have, and also to separately discuss your thoughts about rescheduling the deposition.

While we do not think that Matt needs to be on the call we are requesting, given that you and Finch have a common interest agreement with respect to the Rebiotix litigation (as reflected in our attached engagement letter), we do not have concerns with him joining the call should you want him to be on, as such discussion would still be privileged. Please let us know what times might work best for you (and your other counsel, if you would like them to join) over the next few days.

Thank you, Dr. Borody, [REDACTED]

Ashley

Ashley Ross

KIRKLAND & ELLIS LLP

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ashley.ross@kirkland.com

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Professor Thomas Julius Borody
MD PhD DSc FRACP FACP FACG AGAF FRSN

Centre for Digestive Diseases
Level 1, 229 Great North Road, Five Dock, NSW, Australia
TEL : +61 2 9713 4011 FAX : +61 2 9712 1675

Friday, 2 June 2023

Finch Therapeutics, Inc
c/- Patricia A. Carson
Partner
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
United States

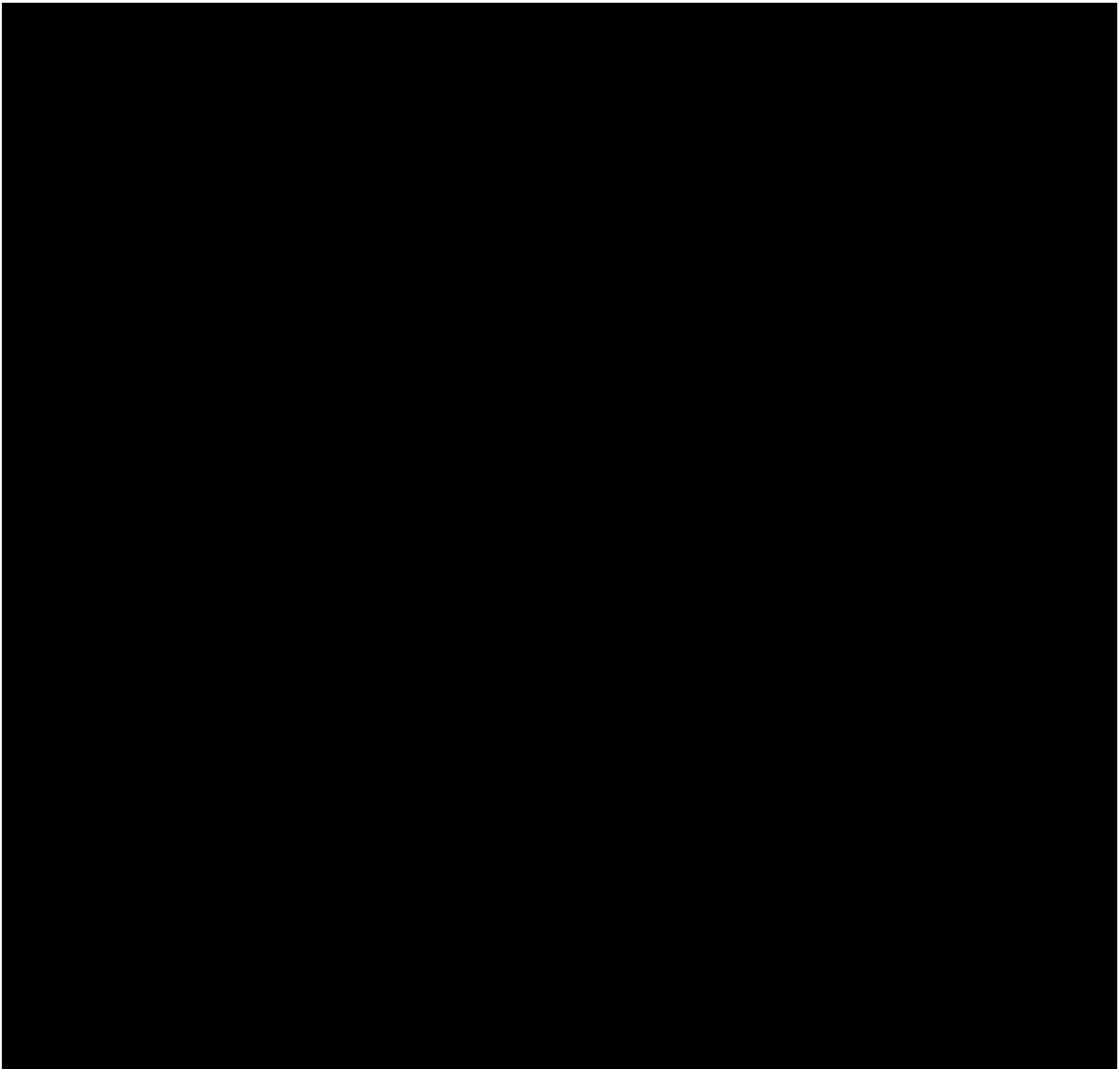


EXHIBIT C

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Patricia A. Carson
To Call Writer Directly:
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June 5, 2023

PRIVILEGED & CONFIDENTIAL

Dr. Thomas J Borody
Director
Centre for Digestive Diseases
Lvl 1, 229 Great North Road
Five Dock NSW 2046
Australia

Re: *Ferring Therapeutics Inc. and Rebiotix Inc. v. Finch Therapeutics et. al*,
C.A. No. 21-1694-RGA

Dr. Borody,

We are in receipt of your May 31, 2023 and June 5, 2023 emails. We are very glad to hear that [REDACTED], and hope that it continues to do so.

In view of the positions you have articulated in your emails, it is apparent that a conflict now exists between Finch and yourself which, though we have been unable to set up a call with you to try to better understand the issues you are now raising, appears quite clearly to be directly related to the above-referenced litigation to the extent you are contending that Finch does not own the patents-in-suit in that litigation. As such, in accordance with our October 6, 2022 retention agreement, and the governing rules of professional conduct, we unfortunately need to resign as your counsel in this matter, which we are doing through this letter.

We remind you that, as set forth in our retention agreement, although it appears that your attorney is representing you in connection with the subject matter of our prior representation, you have agreed to seek separate legal counsel if that is not the case. We also remind you that our communications with you regarding the subject matter of our representation are subject to the attorney-client privilege, that our communications with you involving Finch are also subject to the common interest protection. Accordingly, you are prohibited from disclosing any such communications to third parties without Finch's consent, as memorialized in our engagement agreement with you. If you have questions concerning those obligations, please let us know.

KIRKLAND & ELLIS LLP

Dr. Thomas J Borody
June 5, 2023
Page 2

Furthermore, although we are no longer acting as your counsel in connection with this matter, it is incumbent upon us to help effectuate a smooth transition. Given that, and consistent with our advice throughout our representation of you, we strongly urge you to voluntarily submit to your deposition and to make arrangements with Ferring to set a date for your deposition as soon as you are well enough to do so. Accordingly, we ask that you confirm you will go forward with your deposition, or submit to letters rogatory if sought by Ferring, as soon as your health improves.

Finally, to the extent you have raised issues concerning the ownership of patents on which you are named as inventor, we understand that Finch will reach out to you to discuss your most recent claims and demands. To ensure a clear record on this point, however, to the extent you are suggesting that some form of payment must be made to you in order for you to proceed with your deposition in the Ferring litigation or for you to provide any particular testimony in connection with such a deposition (a suggestion you have not made to our Firm at any prior time), such a request is improper and we reject it. Again, we urge you to sit for deposition as soon as you are able and to provide truthful testimony when you do.

Once again, [REDACTED]
[REDACTED] Should you have any questions about the foregoing, or you would like to discuss the foregoing, please let us know.

Sincerely,

/s/ Patricia A. Carson

Patricia A. Carson

EXHIBIT D

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FERRING PHARMACEUTICALS,)
INC., et al.,)
Plaintiffs,) C.A. No. 21-1694-RGA
v.)
FINCH THERAPEUTICS)
GROUP, INC., et al.,)
Defendants.)

Monday, July 17, 2023
3:30 p.m.
Courtroom 6A

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE RICHARD G. ANDREWS
United States District Court Judge

APPEARANCES:

WOMBLE BOND DICKINSON, LLP
BY: MARY W. BOURKE, ESQ.
BY: DANIEL MARCUS ATTAWAY, ESQ.
BY: DANA KATHRYN SEVERANCE, ESQ.

Counsel for the Plaintiff

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3

1 THE COURT: All right. Good
2 afternoon, everyone. Please be seated. So we
3 have some discovery disputes in number 21-1694,
4 Ferring versus Finch, where Ferring is the
5 plaintiff when they're really the defendant and
6 Finch is the defendant when they're really the
7 plaintiff. Ms. Bourke.

8 MS. BOURKE: Yes, Your Honor.
9 Good afternoon. I'm here on behalf of Ferring
10 and Rebiotix. With me I have Daniel Attaway and
11 Dana Severance and in the back we have Brian
12 Garcia, in-house counsel for Ferring.

13 THE COURT: All right. Good to
14 see you, Ms. Bourke. Ms. Farnan.

15 MS. FARNAN: Good afternoon, Your
16 Honor. Kelly Farnan from Richards, Layton &
17 Finger on behalf of Ferring and UMN. I'm joined
18 by Jeff Moyer from my office. And then from
19 Kirkland & Ellis we have Mike DeVries, Ashley
20 Cade, Patricia Carson, Ashley Ross, Adam Alper.
21 And then in the back of the courtroom we have
22 Matthew Blischak, who is the CEO of Finch.

23 THE COURT: Okay. All right. So
24 I did read the sets of letters that I got. Why

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2

1 APPEARANCES CONTINUED:

2 RICHARDS, LAYTON & FINGER, P.A.
3 BY: KELLY E. FARNAN, ESQ.
4 BY: JEFFREY L. MOYER, ESQ.

5 -and-

6 KIRKLAND & ELLIS, LLP
7 BY: ASHLEY CADE, ESQ.
8 BY: ADAM R. ALPER, ESQ.
9 BY: ASHLEY L.B. ROSS, ESQ.
10 BY: MICHAEL W. DeVRIES, ESQ.
11 BY: PATRICIA A. CARSON, ESQ.

12 Counsel for the Defendant

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24
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4

1 don't we talk about the merger agreement
2 attorney/client one first. I think the general
3 outline that I have here is that Finch -- well,
4 first off, Finch says that Ferring is asserting
5 an advice of counsel defense even though, from
6 I've seen looking at the papers, that's not what
7 Ferring says it's doing. This relates to the
8 agreement between Ferring and somebody else.
9 There was a merger and as I understand it
10 relates to a provision in the merger agreement
11 that in some way is supposed to suggest
12 willfulness by Ferring in relation to
13 infringement because of some provision in the
14 agreement. At a prior discovery dispute, where
15 I think I ordered the documents that were traded
16 back and forth between Ferring and its merger
17 partner, because Finch said these were relevant
18 to why that provision in the agreement was there
19 and I ordered its production. As I understand
20 it, Finch says they produced every last piece of
21 paper that I directed them to provide and now
22 Finch wants communications between --
23 communications that are protected by the
24 attorney/client privilege in and amongst Finch's

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1 accord with what I thought your position was, so
2 thank you.

3 MR. ATTAWAY: Yes, Your Honor.
4 The only other thing that I would point out is
5 they are relying on these documents as well. To
6 the extent that the Court is considering
7 exclusion, it would come --

8 THE COURT: So I'm not going to be
9 ruling on exclusion or excluding anything today.
10 Exclusion -- because you literally have not
11 called it an advice of counsel defense. The
12 argument Ms. Cade is making seems to be premised
13 on this being -- there's a word bankruptcy
14 lawyers use, maybe sub rosa, assertion of advice
15 of counsel, that at least as far as today goes,
16 I'm willing to take it at face value that it's
17 not advice of counsel. And so I think if it's
18 not advice of counsel, then we're not moving to
19 exclude it, then they argue at a later point
20 that it's unfair in some way, but I think it's
21 kind of premature for me to be making those
22 kinds of rulings, so --

23 Let me think if I have another
24 question here. I guess I think -- I think

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18

1 there's multiple moving parts here. One is
2 somewhere down the line are they going to be
3 relying on this merger agreement or even on the
4 communications back and forth to try to show
5 willfulness, you know, the merger agreement
6 generally, the communications generally,
7 specific provisions specifically? You know, the
8 phrase sword and shield is used by at least one
9 of you, maybe both of you. I think there's kind
10 of a balancing here that might have to be
11 exercised at some later point in time, but I
12 don't think I have the context to be doing that
13 now, so all I'm really going to say is that I'm
14 not going to make you produce anything on your
15 privilege log, but you run the risk then at some
16 later point I might exclude some of your
17 evidence, right?

18 MR. ATTAWAY: Understood.

19 THE COURT: And I also -- so
20 that's what I'm going to rule is I'm not going
21 to require you to produce anything more. I
22 don't think, as I sit here today -- well, I feel
23 confident that by you producing these documents
24 that are not privileged you have not waived

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1 privilege. So I won't need a waiver here. And
2 the way you put it in the interrogatory, which I
3 did read, I don't think you've -- I don't see
4 waiver there either. But in the end, you know,
5 it may turn out to be a difficult evidentiary
6 issue, but I think that's where we are. Okay?

7 MR. ATTAWAY: Thank you, Your
8 Honor.

9 THE COURT: All right. So I'm
10 going to deny the Finch's motion on that.

11 So -- and the transcript of what
12 I've said here will memorialize what I think
13 about it right now and what my ruling is.

14 So then we also have a request
15 that Ferring stay this litigation because of,
16 for lack of a better word, surprising
17 developments with Dr. Brody suggesting that he's
18 the owner of the patents because he's owed [REDACTED]

19 [REDACTED] Has there been
20 any progress on this since you -- I guess you
21 only wrote the letters a little while ago. As I
22 recall it, Dr. Brody has not been deposed, but
23 that's on the horizon. And Finch said they
24 would help, if needed, to get Dr. Brody or do

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20

1 what they could recognizing you don't represent
2 him. Is that where things stand?

3 MS. BOURKE: Well, right now, as
4 far as I understand it, Dr. Brody is not
5 cooperating and does not want to sit voluntarily
6 for a deposition.

7 THE COURT: Hold on a second. Is
8 that your understanding?

9 MS. FARNAN: Your Honor, I don't
10 know if we know. We haven't heard from Dr.
11 Brody since Kirkland & Ellis sent him a letter
12 on June 16th.

13 THE COURT: That kind of sounds
14 like he answered, doesn't it?

15 MS. FARNAN: It does, Your Honor.
16 We don't have that from him, but yes, you're
17 correct. We don't -- we are willing to do
18 whatever we can to assist with that, but --

19 THE COURT: But you don't have any
20 leverage yourselves.

21 MS. FARNAN: That's correct, Your
22 Honor.

23 THE COURT: Okay. So, just as a
24 matter of curiosity, how is this standing thing

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1 ever going to be resolved when the person who is
2 causing this problem is, as far as I know, not
3 under oath talking about it?

4 MS. BOURKE: Well, fact discovery
5 is closed, as I heard opposing counsel say
6 earlier. And we were first made aware of this
7 in mid June. It was surprising to us. We had a
8 meet and confer with Kirkland & Ellis where
9 basically they walked us through their position,
10 which is in the June 16th letter, which is
11 exhibit 1 to our letter brief.

12 THE COURT: That the 10-page
13 letter to Dr. Brody?

14 MS. BOURKE: That is correct, Your
15 Honor. And so they cautioned us to investigate
16 seriously the issues that they raised in there,
17 including the 2013 assignment and then other
18 issues that they raised. And we went back to
19 the well and we went back to the production and
20 we looked for the documents which all of which
21 should have been produced because there was an
22 outstanding discovery request, RFP for all
23 documents related to standing. We investigated
24 and through various analytical pathways we went

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1 down, we found chains in the title, several of
2 them and we took that to heart and we told them,
3 we had a meet and confer and we filed our motion
4 as quickly as we could, the same day that we
5 filed the letter brief. And so we have a
6 serious issue out there. The dispute is really
7 between Dr. Brody and Finch, but it does raise
8 jurisdictional issues for us and for the Court,
9 which, as I'm sure you're aware, have to be
10 resolved before we can go to the merits of
11 anything that has to do with these patents. And
12 I've looked at what the briefing schedule would
13 be and if -- we're not asking to expedite that
14 briefing schedule, but if it goes according to
15 the Court's, you know, schedule, it should be
16 fully briefed by the end of July. And we
17 believe that it's a serious enough issue, that
18 it should be resolved. We need to take a pause
19 in the litigation and get it resolved as quickly
20 as we can. I've looked at the schedule. I've
21 come up with alternatives such that we don't
22 move the trial date. But as Your Honor knows,
23 every day litigating patents from which there is
24 a lack of standing is a waste of time and money.

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1 The Brody patents, that's what we call this one
2 set of patents -- there are currently 40 plus
3 asserted claims. The Brody patents make up over
4 half of those. We have coming up extensive
5 report that have to go in for invalidity and for
6 non-infringement and that is a serious
7 expenditure in terms of time and money and
8 expert witness fees, et cetera. And all we're
9 asking is that we take a pause and we get this
10 standing thing sorted out, because we can't get
11 to the merits of this case, at least as it goes
12 to the Brody patents, until standing has been
13 established. Now, standing --

14 THE COURT: You know that's the
15 second time you said that. What exactly do you
16 mean by that? I take it you do not mean that
17 law commands me that we must stop this case
18 while you litigate the standing on some of the
19 asserted patents?

20 MS. BOURKE: No. I think there is
21 case law, though, quite clearly that says that
22 the Court cannot adjudicate the merits of the
23 infringement, validity claims, et cetera,
24 without --

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1 THE COURT: So adjudicate the
2 merits, that's possibly the earliest that could
3 be is summary judgment, right?

4 MS. BOURKE: Correct.

5 THE COURT: Which is, I don't
6 know, six months off, right?

7 MS. BOURKE: Right. My client has
8 asked that we pause the litigation because of
9 the expenditure of money that is going to take
10 place over the next couple of months. And
11 alternatively, if we don't pause the litigation,
12 we go forward and we spend that money and the
13 Court ultimately finds there is a lack of
14 standing we will probably be seeking fees for
15 the expenses that we engaged in to litigate
16 these Brody patents when we first became aware
17 that there was a standing issue. There's time
18 in the schedule to give a brief pause. There is
19 significant prejudice to us. We don't know when
20 Kirkland & Ellis first learned about --

21 THE COURT: Well, generally when
22 they talk about, quote, prejudice, you're not
23 just talking about spending money, right?

24 MS. BOURKE: Well, it's -- the

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1 So to allow the litigation to pause --
2 THE COURT: I'm sorry, publicly
3 disclosed the cash flow was into 2025 meaning
4 they have financing to keep them alive that
5 long?

6 MS. FARNAN: Yes, Your Honor.

7 THE COURT: Okay.

8 MS. FARNAN: But potentially not
9 longer --

10 THE COURT: Right.

11 MS. FARNAN: -- is the point.

12 so --

13 THE COURT: I just want to know --
14 there was a little bit of, for lack of a better
15 word, jargon that I wanted to make sure I
16 understood what you meant.

17 MS. FARNAN: Understood, Your
18 Honor. And so any delay here is going to be
19 prejudicial to Finch. There already has been
20 prejudice to Finch with the infringement, but
21 we're trying to move forward in addressing that
22 infringement and any further delay or a pause in
23 the case is certainly going to be prejudice to
24 Finch. And of course not to mention UMN, which

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1 are separately asserted patents and UMN is not a
2 part of the standing dispute, those patents are
3 going to continue regardless and this case will
4 continue regardless. And so, you know, I think
5 what Ferring essentially asked for is sort of a
6 pause while Your Honor decides the motion. I
7 think there's substantial time in the schedule
8 before any of Your Honor's other decisions on
9 the merits, whatever happened, and we really
10 don't think that there's any reasonably
11 likelihood that Your Honor is going to dismiss
12 this case on the lack of standing, so we ask
13 that the case continue on the current schedule.

14 THE COURT: All right. Thank you.

15 MS. FARNAN: Thank you, Your
16 Honor.

17 MS. BOURKE: May I respond?

18 THE COURT: Sure.

19 MS. BOURKE: First off, I don't
20 think any of the three factors that are
21 considered for a stay motion depend on the
22 merits of the underlying motion, at least as I
23 understand the factors.

24 Secondly, in terms of this burden

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1 shifting that was raised. I read the case. I
2 read the federal circuit case. I've read follow
3 on cases too and it's very clear it's not a
4 shifting of the burden of proof, rather it is a
5 shifting of the burden of production.

6 THE COURT: I understand that.

7 MS. BOURKE: There's a presumption
8 that attaches and you have the ability to rebut
9 that presumption. We believe we have done that
10 in our motion papers that we have come forward
11 with some substantial evidence to shift that
12 burden back to Finch.

13 Secondly, we are not just relying
14 on Dr. Brody's assertions in his letter, as I
15 stated.

16 THE COURT: Which, I mean, can you
17 really rely on them at all?

18 MS. BOURKE: We're not relying on
19 them.

20 THE COURT: Okay.

21 MS. BOURKE: In fact, we're
22 relying on the Kirkland & Ellis letter and the
23 positions they put forward in their letter on
24 June 16th to Dr. Brody in which they counseled

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1 us to go back and study and investigate and we
2 did. And that as I said before, we went through
3 various analytical pathways --

4 THE COURT: All right. Well, so,
5 you did say that before.

6 MS. BOURKE: Right. So it is not
7 simply relying on what Dr. Brody said in his
8 letter.

9 Thirdly, in terms of the schedule,
10 I have put together a proposed schedule where it
11 would not change anything other than -- there
12 was a lot of time in this schedule, a lot of
13 slack for the expert discovery, the reports, the
14 depositions, the summary judgment motions until
15 a May 2024 trial.

16 THE COURT: Right, right. I
17 thought there seemed to be a bit of slack.

18 MS. BOURKE: So there is some time
19 that we can agree to a schedule that would work
20 and it would not prejudice anybody but would
21 simply get this underlying issue resolved.

22 THE COURT: When is the answering
23 briefs to the opening expert reports due or the
24 answering reports?

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PROPOSED PRETRIAL ORDER

EXHIBIT 18.5

FERRING/REBIOTIX'S REPLY IN SUPPORT OF MOTION
IN LIMINE NO. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FERRING PHARMACEUTICALS INC.,
REBIOTIX INC.

Plaintiffs,

v.

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., and FINCH
THERAPEUTICS HOLDINGS, LLC.

Defendants.

C.A. No. 21-1694-JLH

FILED UNDER SEAL

FINCH THERAPEUTICS GROUP, INC.,
FINCH THERAPEUTICS, INC., FINCH
THERAPEUTICS HOLDINGS, LLC, and
REGENTS OF THE UNIVERSITY OF
MINNESOTA

Counterclaim-Plaintiffs/Reply Defendants,

v.

FERRING PHARMACEUTICALS INC., and
REBIOTIX, INC.

Counterclaim-Defendants/Reply Plaintiffs.

FERRING/REBIOTIX’S REPLY IN SUPPORT OF ITS MOTION IN LIMINE NO. 5

Finch's opposition confirms that evidentiary sanctions in the form of an adverse inference and the admission of documents are proper. Finch's counsel represented Dr. Borody during the year Ferring tried to schedule his deposition and represented him when he failed to sit for one. (*See* Exs. B, I to PTO Ex. 18-5; Ex. C to PTO Ex. 18-5-Opp'n.)

Finch does not dispute that it learned days before the scheduled deposition that Dr. Borody intended to testify about "matters which are contrary to [Finch's] interests." (Ex. J to PTO Ex. 18-5.) Dr. Borody's counsel asked Finch the day before his scheduled deposition whether or not he should cancel. (Ex. K to PTO Ex. 18-5.) Rather than responding that he should sit for his deposition as the law required, Finch spoke to Dr. Borody on the phone, and he canceled the next day. (Exs. K, I to PTO Ex. 18-5.)

Finch's attempts to blame Ferring are unpersuasive. While Ferring does not know what Dr. Borody would have said at that time, his testimony would have, at a minimum, hurt Finch's standing argument. Finch's attempt to blame Ferring for not seeking a letter rogatory *after* Finch's counsel withdrew but even processing a letter rogatory request would have taken many months¹ and is no substitute for deposition testimony. Ferring was entitled to rely on Finch's counsel's representations that Dr. Borody would sit for his properly noticed deposition. Finally, the fact that Ferring was able to make a persuasive standing argument without Dr. Borody's testimony does not mean that his testimony would not be relevant or helpful, especially where the Court found a factual dispute as to standing. (*See* D.I. 341.) Finch's actions warrant the requested sanctions.

¹ According to the Hague Convention on Private International Law, just processing letters rogatory to Australia takes approximately six months. (*See* Australia - Central Authority (Art. 2) and practical information, <https://www.hcch.net/en/states/authorities/details3/?aid=485>.)

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